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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1904

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, AND UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, LOCAL 618, *Petitioners,*

v.

NORANDA ALUMINUM, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 528 F.2d 1034 and is reproduced at pp. 1a-10a, *infra*. The findings of fact and conclusions of law of the Dis-

trict Court are reported at 382 F.Supp. 1258 and are reproduced at pp. 13a-25a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1976 (p. 11a, *infra*). A timely petition for rehearing was denied on February 17, 1976 (p. 12a, *infra*). On May 4, 1976 and June 4, 1976 Mr. Justice Blackmun entered orders extending the time in which to file a writ of certiorari until June 15, 1976 and June 30, respectively. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In a suit to recover damages sustained "by reason of any violation of" § 303(a) of the Labor-Management Relations Act of 1947, must the Court, where possible, apportion plaintiff's damages between harms caused by the defendant's violation and harms due to causes for which the defendant is not responsible?

2. Does the requirement of Rule 52(a), F.R.Civ.P. that the court "find the facts specially", apply to the computation of damages in suits under § 303 of the Labor-Management Relations Act?

STATUTE AND RULE INVOLVED

This case involves §§ 8(b)(4)(D) and 303 of the Labor-Management Relations Act of 1947, as amended, (hereafter LMRA) 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 158(b)(4)(D) and § 187. It also involves Rule 52(a) of the Federal Rules of Civil Procedure. These provisions are set forth in Appendix F of this Petition, pp. 27a-28a, *infra*.

STATEMENT OF THE CASE

A. The Factual Background

1. Introduction

Respondent Noranda Aluminum, Inc. ("Noranda") is a Delaware corporation formed to establish and operate a 200-acre primary aluminum smelter in New Madrid County, Missouri. Noranda entered into a contract with Kaiser Engineers, Inc. ("Kaiser") to design and construct the smelter on a cost-plus-fixed fee basis. Petitioner Local 618 is the labor organization which represented the millwrights' craft at the Noranda project; petitioner United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is the International Union with which Local 618 is affiliated. (The petitioners will sometimes be referred to jointly hereinafter as "Carpenters" or "the unions").

This action was brought by Noranda under § 303(b) of the LMRA for losses allegedly sustained by it due to a strike by Local 618 to protest Kaiser's assignment of certain work to another craft in contravention of Kaiser's original assignment. Noranda contended, and the courts below agreed, that the strike was in violation of § 8(b)(4)(D) and thus of § 303(a) of the Act, and that both the Local and the International were responsible therefor. While those liability issues were vigorously contested below, we do not press them in this Court. The questions of general public importance raised by this Petition relate to the propriety of an award of $914,823.54 as damages sustained by Noranda by reason of that violation. They concern the trial court's failure, in calculating the award (a) to make an apportionment between the losses due to the Carpenters' strike and those due to other causes and (b) to find specially, as required by Rule 52(a),

F.R.Civ.P., the facts underlying its resolution of contested elements of the damage award.

While the record is lengthy, and the evidence bearing on damages is unusually complex, we shall curtail our Statement to the minimum necessary to provide background for these legal issues.

2. The Features of an Aluminum Smelter

In order to render intelligible the terminology used herein an abbreviated description of the features of an aluminum smelter is required. The smelter in this case was designed and constructed to consist of 174 reduction (or electrolytic) cells called "pots" (A. 30, 176-177).[1] These 174 "pots" are set up in two pot rooms with 87 pots in each room; pot room is "a term used in the aluminum industry to denote the reduction cell arrangement where aluminum oxide is smeltered into primary aluminum metal" (A. 176-177, E. 46). The two pot rooms are in two separate buildings joined together at each end constituting a single pot line (*ibid.*).

There are two stages in the construction of an aluminum smelter. One is known as "first metal". This is the stage at which the smelter first attains the capacity to produce primary aluminum through the pot room. (A. 195). The other is known as total physical completion of the plant, at which the smelter in its entirety has been fully constructed; it includes such matters as painting, road construction, and landscaping, which are not critical to the start-up production. (A. 198, 242, 358-360.)

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[1] "A." refers to volumes I and II of the Appendix; "E." refers to volumes II and IV of the Appendix containing the exhibits.

3. The Strike, Noranda's Theory of Damages, and Defendants' Principal Objections Thereto

The millwrights' strike occurred from July 30 to August 13, 1970, a period of 11 workdays (A. 72, 138, 337). Most crafts did not work during the strike (E. 143-144, A. 552-553, 246, 416). The theory underlying most of Noranda's damage claims was that this strike had caused a 33-day delay, from January 23 to February 25, 1971, in reaching "first metal" for 88 pots. The major component of damages which Noranda ascribed to that delay was the cost of excess overtime of employees of Kaiser, Comstock-Roper, the electrical contractor (a total of $626,361) and Noranda's fixed price subcontractors ($66,729). Certain additional expenses consisting of additional construction and raw material costs, salaried and utility overhead payments, rental and depreciation costs of equipment were also said to stem from this delay. There were other items, most of them uncontested on appeal, which were said to flow directly from the strike.

The unions presented two major objections to Noranda's theory, and the conclusion it drew therefrom: (1) the time target which was assertedly delayed by 33 days was based on a wholly unreliable and arbitrary projection; (2) accepting the 33-day delay premise, the unions could be charged with only a fraction (calculated to be at most 35.5%) of the resulting costs because it was caused also by the strike of another craft, the laborers, and by labor inefficiency, particularly among the electricians.[2]

---

[2] The claim for overtime to fixed price subcontractors was further objected to because Noranda sought the *entirety* of such overtime although some was incurred *before* the millwrights' strike and thus could not possibly be caused by it, and some was incurred after February 25, 1971, the date to which the strike allegedly delayed the attainment of first metal, and thus was not connected to the strike even on that theory.

We now set forth in summary fashion the evidence pertaining to these issues.

a. The Unacceptability of January 23, 1971 as a Reliable First Metal Projection.

The projection of January 23, 1971, for 88 pots was latest of a series of projections made by Kaiser by utilizing a planning tool known as critical path method (or CPM). The various inputs essential to the estimate are programmed into a computer and the net of these variables emerges as the milestone dates for completion of particular phases of the work. One important input is the anticipated efficiency of labor. Kaiser developed an expected standard of labor efficiency for the Noranda project. This projected standard which Kaiser estimates it will attain, is quantified at 100%, and the efficiency actually achieved thereafter is calculated as a percentage of that 100%. (A. 160-163, 193, 215, 240, E. 382.)

Kaiser acknowledged, "All such conclusions . . . depend on certain numbers of inputs. By varying the input, of course, you can vary the conclusion" (A. 215). Kaiser's inputs into its CPM were demonstrably unsound based on the immense disparity between projections made and actually achieved.

Well before the millwrights' July 30-August 13, 1970 strike, the first metal date had already been twice revised, resulting in a total delay of two months and three weeks to the latest date of January 23, 1971. (A. 193-196, 216-217, E. 48) It is therefore perfectly clear that there is nothing firm or infallible about Kaiser's first metal dates. The January 23, 1971 milestone was of course not reached. First metal was not attained until February 25, 1971, and then only on a modified 88-pot basis (33 days late), and first metal on

the projected 174-pot basis was not attained until mid-June 1971 (almost five months late). To ameliorate the obvious lack of any rational cause-effect relationship between an 11-day strike and a five-month delay, Noranda ignored the failure to reach first metal on a 174-pot basis until mid-June 1971, and acted instead as if reaching first metal on an 88-pot basis February 25, 1971 was the achievement of its projected January 23, 1971 milestone. Through this sleight of hand it reduced the delay to a more reasonable 33-day time lag, making more palatable ascription of the shorter delay to the millwrights' strike.

The unreliability of Kaiser's CPM milestones is further shown by the contrast between projected and actual physical completion of the project. The June 30, 1970 CPM projected physical completion as of March 1, 1971 (E. 385, 387, A. 392), a four-month delay (A. 219-220). But this revised date was not achieved. Instead physical completion did not take place until October 1, 1971 (E. 385, 387, A. 392). This seven-month lag in completion could not rationally be ascribed to an 11-day strike. Indeed, as of June 30, 1970 (*before* the strike) completion was 20% behind schedule; it was still 20% behind schedule as of November 30, 1970 (*after* the strike) (A. 219-220, 226-227).

Yet another measure of the unreliability of the CPM is the enormous cost overrun in the construction of the smelter. Originally scheduled to be $85,000,000, the cost actually came to $107,000,000, an overrun of $22,000,000 (A. 476, 482). A cost error of this magnitude, of which even plaintiff sought to ascribe less than 5% to the millwrights' strike, plainly demonstrates that Kaiser's estimates of variables were seriously deficient.

b. Labor Inefficiency, Particularly Among the Electricians, and Resulting Overtime.

As already noted, an important input into Kaiser's CPM projection is the expected standard of labor efficiency. Kaiser admitted that the level actually attained was "considerably below" its projection (A. 216); its progress report for June 1970 succinctly stated, "The major portion of this increase in costs can be directly traced to the inefficiency of labor" (A. 843).

Kaiser's overestimation of labor efficiency was vast. As of June 30, 1970, it reduced its expected cumulative attainment of labor efficiency from 100% to 60%, and later again reduced it to 52% (A. 409, 458-459, 509-510). But its actual known attainment of cumulative labor efficiency did not exceed 48.6% (E. 382).

The cause-effect relationship between labor inefficiency and recourse to overtime to overcome it can be concretely pinpointed. For Kaiser's own reports show in detail that it was primarily the inefficiency of the electricians which eventuated in the heavy incurrence of overtime work. "... [T]he electrical work in general was important throughout the plant because this is an electrolytic plant. Electrical work is a major part of the total project and the total cost of the project ..." (A. 384). And the electricians were found to be particularly inefficient (A. 461, see also, A. 228, 239).

For example, in its June 30, 1970 project status review Kaiser pinpointed the inefficiency of the electricians as a principal source of difficulty:

> "At the February meeting we had stressed that critical control dates could and would be met. The first of these dates were for the rail unloading facility, the preparation of cathode blocks, and the mixing of cathode paste for potlining. Their original schedules were legitimate. *We did not meet them because of delays due primarily to lack of efficiency on the part of the electricians. For the same reason the dates are still not achieved.*" (E. 821, A. 220, emphasis added).

The problem with the electricians did not abate. Kaiser's project status review of October 15, 1970, particularized the situation as follows (E. 860, A. 222-223).

> "In our July review we had expected that during the latter stage of the program, we would be experiencing a gradual improvement in efficiency of labor; it had been assumed that even though efficiencies were lower at the time, there would be a sufficient period when productivity would be better, such that the accumulated average would be 60% for the entire project.
>
> The following graph portrays that this has not been the case. During the months of August and September, we have only attained 48% and 46% respectively, *much of this due to the extremely low productivity of the electricians.* With the expectation that there will be no improvement, it is now projected that the accumulated average for the entire project will be 52%, 8% below the 60% previously envisioned. (emphasis added).

In October 1970, in an effort to increase the productivity of the electricians, the electrical subcontractor (Comstock-Roper) laid off 100 of its 400 electricians, separating those electricians it considered inefficient (A. 411-412, 430-431). The method chosen to make up for the production lost by this decrease in the the force, was recourse to scheduled overtime (E. 868, 878, A. 412). On November 9, 1970, Kaiser scheduled the electricians, pipefitters, and supporting crafts to

work five 10-hour days per week, ten hours in excess of the regular 40-hour work week (A. 382, E. 878, 904, A. 227-228, 241, 245, 385-368).[3]

c. The Laborers' Strike.

The laborers engaged in a three-day strike on July 23, 24, and 27, 1970, which caused a total stoppage of work on the project for its duration. As reported by Kaiser on August 12, 1970, the 3-day laborers' strike resulted in a loss of 43,464 man-hours, as compared with the loss of 110,000 man-hours resulting from the ensuing July 30-August 13, 1970 millwrights' strike of eleven working days. (A. 355-356, 404-406, E. 135, 142). The laborers' strike was thus more intensive in daily man-hours lost than the millwrights' strike and accounted for more than 28.3% of the man-hours lost in the combined laborers' and millwrights' strikes of 14 working days.

B. The Proceedings Below

1. The District Court

The complaint was filed on August 13, 1970 (the day the strike ended) and was amended as to damages only on April 10, 1971.[4] The case was tried to the court (Meredith, J.). On December 28, 1973, the Court en-

[3] On December 10 or 14 scheduled overtime was extended to all crafts, but on a reduced basis, all crafts now working a 48-hour work week. (A. 384-386, 415-416). The scheduled overtime was again reduced in early January 1971, a 45-hour work week, (A. 385-386, 415-416), until February 25, 1971, when all crafts reverted to a 40-hour regular work week, with overtime thereafter limited to "some spot overtime" (A. 200-201, 386, 416).

[4] Both of the complaints calculated damages on the basis of injury suffered during the strike; originally Noranda claimed $30,000 per day (A. 16) which was raised to $167,781 per day in the amended complaint (A. 19).

tered judgment for Noranda against both defendants in the amount of $914,823.54. In its accompanying findings of fact and conclusions of law it determined that the strike violated § 8(b)(4)(D) of the LMRA and that both defendants were responsible therefor.

The trial court's findings on the damage issues were extremely sparse. The court found that Kaiser had made a pre-strike projection of first metal for 174 pots as of January 23, 1971, then after the strike, reducing it to 88 pots; but it did not discuss the unions' critique of the method by which either projection was reached. It arrived at the amount of damages by listing, without further explanation, six categories of injuries which it found the plaintiff suffered "as a result of [defendants' illegal] conduct" (¶ 21, p. 21a, *infra*), and totalling them (*id.*, p. 22a).[5] The entire $690,090.10 in increased overtime payment to the employees of Kaiser, Comstock-Roper and fixed price subcontractors "during and as a result of the strike" was lumped together in a single subparagraph (*id.*, ¶ (c)).[6] The court's sole discussion of the unions' objection to the damage claim and particularly to being charged for the entire delay is contained in the following two sentences: "They also contend that the damages were partially caused by a three-day strike of the laborers in July of 1970, that the premium time of $295,290.00 paid to the electricians was not caused by the strike. The Court rejects all of these contentions." (p. 22a, *infra*).

[5] The court rejected plaintiff's claims for prejudgment interests, attorneys' fees in this suit, and "loss of cash flow caused by the strike over a period of twenty-two years in the sum of $551,574.15" (¶ 23, p. 22a, *infra*).

[6] Other categories also subsumed, without even identifying them, several contested items.

2. The Court of Appeals

The Court of Appeals affirmed. In an opinion by Mr. Justice Clark, the Court approved the liability determinations (pp. 5a-6a, *infra*). The court noted the union's acquiescence in the allowances of some items of damages and sustained, as not "clearly erroneous" the controverted awards on the items other than overtime (pp. 7a-8a, *infra,* nn. 1-3).

The court observed that in suits under § 303 damages

> "cannot be proven with exacting detail and the proof is therefore quite sufficient where the evidence supports a just and reasonable approximation. *Sheet Metal Workers, Local 223* v. *Atlas Sheet Metal Co.,* 384 F.2d 101, 109 (5th Cir. 1967)." (p. 9a, *infra*)

For that reason, although "it is true that the trial court did not spell out in meticulous detail each item of damage" (*id.*), the trial court's findings were deemed sufficient. See *id.,* quoted at p. 24, *infra.*

With respect to the union's position that plaintiff was not entitled to recover all the losses resulting from the delay, because that delay was caused also by the laborers' strike and the inefficiency of labor, particularly the electricians, the Court of Appeals reached the same result as the District Court, but by its own line of reasoning. The Court of Appeals determined that labor inefficiency may have, and the laborers' strike certainly did contribute to the delay But it concluded that "the overall method of calculating the damages was eminently just and fair to the Unions and that the total amount allowed was a reasonable approximation of the amount suffered by Noranda" (p. 10a, *infra*), because the trial court calculated the

delay on the basis of 88 pots on January 23, rather than the prior projection of 174 pots[7] on that date:

> "*Perhaps some of this delay was occasioned by inefficient labor and certainly some was occasioned by the 3-day laborers' strike,* but the point is that the trial judge chose February 25, 1971, as the cut-off date, when only 88 pots were completed. If he had chosen the mid-June date, when all pots were completed, perhaps the items that the Unions now complain about, as well as some others, would have some weight in the final calculations. We believe, however, that the course pursued was certainly a most reasonable and fair approximation. Indeed, if a later date had been chosen, making allowance for the expedition afforded the 88-pot project, and if the trial judge would have meticulously calculated the percentages as the Unions suggest, we dare say the damages would have totalled a much higher figure." (Pp. 9a-10a, emphasis added).[8]

REASONS FOR GRANTING THE WRIT

I. The Decision Below Subverts the Congressional Intent in Allowing Only Compensatory Damages Under the Labor-Management Relations Act and Ignores Accepted Tort Principles for Measuring Recovery for Injury to Economic Interests Caused by Violations of Federal Law.

A. By charging defendant unions for the entire loss resulting from the delay in reaching 88 pots, although "[p]erhaps some of this delay was occasioned by inefficient labor and certainly some was occasioned by the

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[7] The reference to "176 pots" in the opinion is an inadvertent error.

[8] The Court also rejected Noranda's cross-appeal. The loss of cash flow was described as "reminiscent of the Rube Goldberg cartoons that graphically transposed speculation into fact by a series of drawings depicting causes and effects." (p. 10a, *infra.*)

3-day laborers' strike" (p. 9a, *infra*), the court below undermined the Congressional determination, given force in *Teamsters Union* v. *Morton,* 377 U.S. 252, that under § 303 of the LMRA a plaintiff may recover only for damages proximately caused by a violation of § 8(b)(4). The decision below is also in square conflict with a holding of the Second Circuit that in computing back pay in a case arising under § 10(c) of the same Act, which likewise authorizes only compensatory awards, the Labor Board must apportion the employees' losses so as to exclude those which they would have incurred even absent the unfair labor practice. *Trico Products Corp.* v. *N.L.R.B.,* 489 F.2d 347 (C.A. 2, Friendly, J.). And while the decision's most immediate and obvious effect is in the labor field, its principle necessarily extends to the entire range of federal statutes which allow one party to recover monetary damages from another for injuries proximately caused by a statutory violation. For, as this Court observed in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 418-419: "* * * where a legal injury is of an economic character,

> '[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.' *Wicker* v. *Hoppock,* 6 Wall. 94, 99 (1867)."

Viewed in that broader context, the holding below is contrary to the established principles of the law of torts, and a series of decisions in which this Court exhaustively considered the apportionment of damages. Those decisions avoided, but the court below

reached, "the one certainly unjust course of giving the plaintiffs everything, because the defendants cannot with certainty compute their own share" (L. Hand, J., in *Sheldon* v. *Metro-Goldwyn Pictures Corp.,* 106 F.2d 45, 51 (C.A. 2), affirmed and quoted with approval, 309 U.S. 390, 398).

B. In *Teamsters Union* v. *Morton,* 377 U.S. 252, this Court unanimously held it to be the Congressional judgment "reflected both in the language of the Federal statute and in its legislative history, that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by § 303 should be limited to actual, compensatory damages" (*id.* at 260, footnotes omitted). That language, as quoted by the Court, is: "[w]hoever shall be injured in his business or property . . . shall recover *the damages by him sustained. . . .*" (*id.* at n. 15, this Court's emphasis). Thus, *Morton* "permit[s] recovery under § 303 of damages suffered during a strike characterized by proscribed secondary activity only to the extent that the damages claimed were the proximate result of such activity." *Mine Workers* v. *Gibbs,* 383 U.S. 715, 731, n. 17.

The same "make-whole" principle of relief is established by § 10(c) of the Act which governs the remedial powers of the Labor Board, see particularly *Phelps Dodge Corp* v. *Labor Board,* 313 U.S 177, 197 and other cases cited in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 at 419.[9] Thus, questions of recovery under the Labor-Management Relations Act are governed by the same principles as federal statutes generally (see

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[9] See also *e.g., Republic Steel Corp.* v. *Labor Board,* 311 U.S. 7 and *Labor Board* v. *Carpenters Union,* 365 U.S. 651, which, like *Morton* (377 U.S. at 260-261) expressly reject punitive relief.

id. at 418-419 and p. 14 *supra*). Indeed, the question raised in this case, of assessing damages proximately caused by tortious conduct where some of the injury suffered by the plaintiff is due to causes (be they tortious or nontortious) for which the defendant is not legally responsible is familiar to the law of torts, and that law, as we next show, requires apportionment in a case like the present.

In the section of his treatise entitled "Apportionment of Damages", Dean Prosser declared:

> "Once it is determined that the defendant's conduct has been a cause of some damage suffered by the plaintiff, a further question may arise as to the portion of the total damage sustained which may properly be assigned to the defendant, as distinguished from other causes. The question is primarily not one of the fact of causation, but of the feasibility and practical convenience of splitting up the total harm into separate parts which may be attributed to each of two or more causes. *Where a logical basis can be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm which he has in fact caused, it may be expected that the division will be made.* Where no such basis can be found, and any division must be purely arbitrary, there is no practical course except to hold the defendant for the entire loss, notwithstanding the fact that other causes have contributed to it." [10]

[10] The analysis continues:

> "The distinction is one between injuries which are reasonably capable of being divided, and injuries which are not. • • • There will be obvious difficulties of proof as to the apportionment of certain elements of damages, such as physical and mental suffering and medical expenses, *but such difficulties are not insuperable, and it is better to attempt some rough division than to hold one defendant for the wound inflicted by the other.* Upon the same basis, if two defendants each pollute a stream with oil, it is possible to say that each has interfered to a separate extent with the plaintiff's rights in the water, and to make some division of the damages. It is not possible if the oil is ignited, and burns the plaintiff's barn.
>
> "*In general, it may be said that entire liability will be imposed only where there is no reasonable alternative.*" Prosser, *Torts* (4th ed., 1971), pp. 313-314, footnotes omitted, emphasis added.

The foregoing views were adopted by the American Law Institute in Restatement of Torts, Second. Section 433A, entitled "Apportionment of Harm to Causes" provides:

> "(1) Damages for harm are to be apportioned among two or more causes where
>
> (a) there are distinct harms, or
>
> (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
>
> (2) Damages for any other harm cannot be apportioned among two or more causes."

The rule stated in § 433A was followed by the Second Circuit to require apportionment in determining the amount of back pay due to employees who were discharged for illegal reasons, but who would have been laid off in any event in a reduction in force caused by the employer's loss of business. *Trico Products Corp.* v. *N.L.R.B.*, 489 F.2d 347 (C.A. 2). Judge Friendly, writing for the Court, reasoned:

> "The Administrative Law Judge was far more convincing in finding that the unfair labor practice merely accelerated the layoffs. The situation is the one, familiar in other contexts, 'where a part of the harm caused would clearly have resulted from the innocent conduct of the defendant himself, and the extent of the harm has been aggravated by his tortious conduct;' in such instance

> the damages should be apportioned as between the tortious and the innocent conduct. Restatement of Torts 2d § 433A at 437." [11]

Reversing the Labor Board, the Court of Appeals held that the discriminatees were entitled to back pay only up to the date (to be determined on remand) "when the employees would have been laid off in the absence of" the protected activity which prompted their discharge. *Id.* at 354.

Even as the discharge of the employees in *Trico* "merely accelerated the lay off" of the discriminatees, so the unions' strike herein only aggravated the delay which was caused by the laborers' strike and the failure of the work force as a whole, and particularly the electricians, to achieve the projected labor efficiency standard. And so, even as the employer in *Trico* was chargeable with only a portion of the employees' wage losses, so the Carpenters here should have been assessed only for that portion of the excess costs resulting from the delay which was attributable to the millwrights' strike. Thus, the Eighth Circuit's refusal to require apportionment of plaintiff's damages in this case is in square conflict with the Second Circuit's decision in *Trico.*

This apportionment principle has been uniformly approved by this Court in a series of decisions arising under the patent and copyright laws, culminating in *Sheldon* v. *Metro-Goldwyn Pictures Corp.,* 309 U.S. 390. There the principal question was stated to be

> "whether, in computing an award of profits against an infringer of a copyright, there may be an apportionment so as to give to the owner of the copyright only that part of the profits found to be attributable to the use of the copyrighted material as distinguished from what the infringer himself has supplied," (*Id.* at 396).

[11] 489 F.2d at 353; Judge Friendly's quotation is from the "Comment" on § 433A(1) of the Restatement, set forth above.

Writing for a unanimous Court, Mr. Chief Justice Hughes answered this question in the affirmative. He found persuasive the precedents which had held that where the infringed patent covers only a part of a machine and creates only a part of the profits, it is only that portion which the plaintiff-patentee may receive as damages for the enforcement so that he must, unless it is impossible to do so, make an apportionment between the contribution of his patent and that made by the defendants. *Id.* at 402-405.[12] Chief Justice Hughes rejected the plaintiff's reliance on the fact that the defendants had been "found guilty of deliberate plagiarism", perceiving

> "no ground for saying that in awarding profits to the copyright proprietor as a means of compen-

[12] The leading patent cases are *Westinghouse Electric & Mfg. Co.* v. *Wagner Electric & Mfg. Co.*, 225 U.S. 604, and *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.*, 235 U.S. 641. In the latter case, the Court held:

> "In so far as the profits from the infringing sales were attributable to the patented improvements they belonged to the plaintiff, and in so far as they were due to other parts or features they belonged to the defendants. But as the drills were sold in completed and operative form the profits resulting from the several parts were necessarily commingled. *It was essential therefore that they be separated or apportioned between what was covered by the patent and what was not covered by it,* for, as was said in Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co., 225 U.S. 615: 'In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains.'" 235 U.S. at 646, emphasis added, quoted in *Sheldon,* 309 U.S. at 404.

sation, the court may make an award of profits which have been shown not to be due to the infringement. That would be not to do equity but to inflict an unauthorized penalty. * * * " (*Id.* at 405-406)

So too, in the present case, an award of damages for the entire loss caused by delay in reaching the 88-pot target, where only some of that delay was caused by the Carpenters' strike, would "inflict an unauthorized penalty" contrary to the policy of the Labor-Management Relations Act, and the express teachings of *Morton,* 377 U.S. at 260-261, see p. 15 *supra.*

In *Sheldon* and its predecessors apportionment was required unless "the act of the defendant had made it 'not merely difficult but impossible to carry the burden of apportionment' " (*Sheldon*, 309 U.S. at 403, quoting *Westinghouse,* 225 U.S. at 618).[13] This too, is accepted tort doctrine. As Prosser has written:

> "The difficulty of any complete and exact proof in assessing such separate damages has received frequent mention in all these cases, but it has not been regarded as sufficient justification for entire liability. The emphasis is placed upon the logical possibility of apportionment, and the distinct and

[13] See also 309 U.S. at 404, describing *Dowagiac,* and *id.* at 398, observing that the Court of Appeals had "fully recognize[d] the difficulty in finding a satisfactory standard, [but had] decided that there should be an apportionment and that it could fairly be made".

Likewise, in *Trico Products,* p. 17 *supra,* the Labor Board was directed to make an apportionment even though reconstruction of when the employees *would have been* laid off necessarily involved several "lines of inquiry", some of which Judge Friendly set forth "as illustrative and not by way of limitation." 489 F.2d at 354.

> separate invasion of the plaintiff's interests which may be attributed to each cause." [14]

This difficulty has been met, not by permitting the plaintiff to recover from the defendant for all of its injuries, even though he has not caused them, but by relaxing the requirements of proof on the issue of causation, so that "general evidence as to the proportion in which the causes contributed to the result will be sufficient to support a verdict." [15]

This is but an instance of the rule which permits "just and reasonable approximation of the actual amount of damages" where the nature of the injury renders greater certainty impossible. The question whether to apportion is one of law,[16] and the answer, as we have seen, depends on whether an apportionment is logically possible. The rule of "just and reasonable

[14] Prosser, *Torts* (4th ed., 1971), p. 318. See also *id.* at 317:

> "Evidence may be entirely lacking upon which to apportion some elements of the damages, such as medical expenses, or permanent disability, or the plaintiff's pain and suffering; but this never has been regarded as sufficient reason to hold one defendant liable for the damage inflicted by the other."

[15] *Id.* at 318.

[16] Comment *d* to § 434 of the Restatement of Torts, Second (p. 448) states:

> "The question whether the harm to the plaintiff is capable of apportionment among two or more causes is a question of law, and is for the decision of the court in all cases. Once it is determined that the harm is capable of being apportioned, the actual apportionment of the damages among the various causes is a question of fact, which is to be determined by the jury, unless the evidence is such that reasonable men could come to only one conclusion."

See also the black letter law, particularly §§ 434(1)(b) and (2)(b), *id.* p. 447.

approximation" comes into play in resolving questions of fact—in ascertaining the amount of the plaintiff's total loss, and in apportioning that loss among causes.[17]

Thus, when the court below invoked that rule to sustain the trial court's failure to apportion (pp. 9a-10a, *infra*), it confused two separate and distinct lines of analysis. The very case cited by the Court of Appeals for permitting approximation in calculating damages recoverable under § 303, *Sheet Metal Workers Local 223* v. *Atlas Sheet Metal Co.*, 384 F.2d 101 (C.A. 5), demonstrates that the trier is not thereby relieved of the duty to separate losses which are caused by the defendants' violation and those which are not. For there, the Court laid down "guidelines to aid the District Court" in a new trial on the issue of damages:

> "Since section 303 is purely compensatory, all elements of damages must be directly related to or caused by the unlawful secondary activity. Thus, long distance telephone calls may be recovered only if they are attributable to the picketing, and salaries of employees who did not refuse to work may be recovered only to the extent that these employees were rendered unproductive as a result of the picketing." (*Id.* at 110.)

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[17] This, too, the decisions show. See, *e.g.*, *Sheldon*, *supra*, 309 U.S. at 408:

> "What we said in the Dowagiac Mfg. Co. Case [255 U.S. at 647] is equally true here,—that what is required is not mathmatical exactness but only a reasonable approximation. That, after all, is a matter of judgment; and the testimony of those who are informed by observation and experience may be not only helpful but, as we have said, may be indispensable. Equity is concerned with making a fair apportionment so that neither party will have what justly belongs to the other."

Thus, while the Fifth Circuit did not use the word "apportionment", it made clear that as to each item of claimed damage the trier may allow recovery only for, and thus must determine, that portion which is attributable to the defendants' tort. It is this method alone which accords with the tort principles which we have discussed and which avoids frustration of Congress' policy that the § 303 remedy was provided "only to restore to people who have lost something because of boycotts and jurisdictional strikes the money they have lost." Sen. Robt. A. Taft, explaining § 303, 93 Cong. Rec. 4858, quoted and treated as authoritative in *Morton*, 377 U.S. at 260, n. 16.

II. The Decision Below Creates an Unprecedented and Unsound Exception to the Specificity Requirements of Rule 52(a), F.R.Civ.P.

A. As shown in the Statement (p. 11, *supra*), the District Court's findings of fact were wholly conclusory; the trier simply identified those elements of plaintiff's damage claim which it accepted, without specifying the factual basis for that conclusion or even why it awarded the precise amount claimed where that was in controversy. The Court's findings thus failed to comply with the unequivocal requirement of Rule 52(a): "In all actions tried upon the facts without a jury . . . the Court shall find the facts specially . . . ." Nevertheless, the Court of Appeals affirmed some of those findings on the basis of the "clearly erroneous" review standard of that rule. See pp. 7a-8a, nn. 1, 2 and 3, *infra*. And it tacitly accepted, see pp. 9a-10a *infra*, the Critical Path methodology on which all delay claims depended, although

the trial court had made no findings with respect to the unions' detailed challenge to the validity of that method. The Court said:

> "While is is true that the trial court did not spell out in meticulous detail each item of damage, he did clearly find that each item was caused by the illegal srike and that each was a just and reasonable approximation of the actual amount of the damages. The cases on claims of this type require no more. *Vulcan Materials Co.* v. *United Steel Workers of America*, 430 F.2d 446, 457-58 (5th Cir. 1970), *cert. denied,* 401 U.S. 963 (1971)." (p. 9a, *infra*)

The Court of Appeals thereby carved out a special rule for cases on claims "of this type"—that is, suits for damages under § 303 of the LMRA. This holding should be reviewed because of its recurring importance in suits under § 303, and because it is clearly mistaken. The importance of the question can be readily perceived. The amount of damages caused by a strike in violation of § 303 will almost invariably be a subject of controversy in such suits precisely because, as the Court of Appeals observed, they "cannot be proven with exacting detail" (*id.* p. 9a, *infra*), the union is not likely to take the employer's claim on faith. Indeed, since some Circuits have held that a Labor Board finding that a violation of § 8(b)(4) has been committed is binding on the defendant in a suit under § 303,[18] the amount of damages issue will often be the only matter in controversy.

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[18] See *Painters District Council 38* v. *Edgewood Contracting Co.*, 416 F.2d 1081 (C.A.5); *International Wire* v. *Loval 38,* 475 F.2d 1078 (C.A.6), cert. denied, 414 U.S. 867; *Paramount Transport Systems* v. *Teamsters Local 150,* 436 F.2d 1064 (C.A.9).

The Court of Appeals' view that the ordinary requirements of clarity and specificity in findings are excused in suits under § 303 finds no support in the single case which it cited, *Vulcan Materials Co.* v. *United Steel Workers of America,* 430 F.2d 446, 457-458 (C.A. 5), cert. denied, 401 U.S. 963. For while that case did arise under § 303, the sufficiency of the findings was nowhere discussed in the *Vulcan* opinion; that case was apparently cited because it reaffirmed and quoted with approval the holding in *Sheet Metal Workers* (see p. 22 *supra*) that damages may be determined on the basis of a just and reasonable approximation, following (as the *Vulcan* court noted) *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 255.[19]

Indeed, the decision below is in direct conflict with two decisions in the Ninth Circuit which have vacated damage awards in § 303 suits because the trial court had not complied with Rule 52(a). *Carpenters Local 1273* v. *Hill,* 398 F.2d 360 (C.A. 9); *Plumbers & Fitters, Local 761* v. *Matt J. Zaich Const. Co.,* 418 F.2d 1054 (C.A. 9). As the Court said in the latter case:

> "when it is possible to prove damages by definite calculation, they should be proved in detail. Christiansen v. Mechanical Contractors Bid Depository, 230 F. Supp. 186, 194 (D. Utah 1964). *Cf.* Story Parchment Co v. Paterson Parchment Paper Co., 282 U.S. 555, 562" (*Id.* at 1059)

This citation of *Story* leaves no doubt that the Ninth Circuit was fully cognizant of the rule that a "just

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[19] The only other damage determinations in *Vulcan* were that attorneys' fees for removing pickets may be recovered and that the failure to mitigate damages defense was without merit.

and reasonable approximation" of damages is permissible. But that Court correctly declined to treat it as an excuse for inadequate findings. For that rule is but an exception—albeit one which is significant and unquestioned—to the overriding principle that "damages may not be determined by mere speculation or guess", as the *Story* opinion shows, 282 U.S. at 562.

Thus, the law does not regard imprecision in the calculation of damages as inherently desirable. Approximation is permitted solely in order to allow the plaintiff *some* recovery even though "the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty" (*id.*). Given the reason for the rule, the award should be as exact as the circumstances will allow. Precision in the fact finding process is essential to that end. If the inherent uncertainty bears at all upon the degree of specificity which findings should achieve, it call for greater care. For then the findings perform the indispensable function of setting the upper and lower limits of the damages which the evidence can justify; only if that is carefully done can a range be determined within which an approximation will be just and reasonable. Unless the individual components of the damage award are carefully examined neither the trier nor the reviewing court can determine that the total is anything but speculative, and that the plaintiff's failure to prove greater damages is due to uncertainties created by the defendant rather than the inherent weakness of the plaintiff's claim.[20]

[20] One example will illustrate our point, and also demonstrate the prejudice to the defendants in this case:

The Court of Appeals opined that if the trial judge "had chosen the mid-June date when all pots were completed" rather than the date when 88 pots were completed "and if the trial judge would have meticulously calculated the percentages as the Unions suggest, we dare say the damages would have totalled a much higher figure" (pp. 9a-10a, *infra*). This is admittedly surmise ("we dare say") and thus impermissible. Moreover, it is inherently unlikely. The 88-pot theory originated not with the trial judge, but with Noranda; Noranda presumably would have presented its claim on the basis of the delay in reaching 174 pots if it had thought that a larger recovery would thereby result. Indeed, one of the Unions' major objections to the CPM method was that by stating its claim on the basis that 88 pots should be reached on January 23, 1971, whereas that day was originally the target for 174 pots, Noranda had camouflaged the utter implausibility of ascribing a five-month delay in completion to an 11-day millwright strike. Neither the trial court nor the Court of Appeals dealt with this or any of the other objections to the CPM projection. Thus, the Court of Appeals excused the insufficiency of the findings by assuming the answer to one of the critical issues which those findings should have addressed—the validity of the method which was the essential predicate of the major component of the entire damage award.

While the importance of this issue for the adjudication of suits under § 303, and the conflict with the § 303 cases in the Ninth Circuit amply justify certiorari, the impact of the decision will not readily be confined to its immediate statutory context. To excuse noncompliance with Rule 52(a) in computing damages because these are subject to just and reasonable approximation is to invite error, and to frustrate appellate review wherever the inherent uncertainty in the amount gives rise to approximation, most notably in the antitrust field where *Story* and its progeny are in fullest flower.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1467
No. 74-1562

NORANDA ALUMINUM, INC.,
Appellee and Cross-Appellant,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, LOCAL 618,
Appellants and Cross-Appellees.

Appeal and Cross Appeal from the United States District Court for the Eastern District of Missouri

Submitted: March 10, 1975

Filed: January 5 1976

Before GIBSON, Chief Judge, CLARK, Associate Justice,* and LAY, Circuit Judge.

MR. JUSTICE CLARK.

Appellants and cross-appellees, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpenters' International) and Local 618 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Local 618) appeal from a judgment in the amount of $914,823.34 recovered against them by appellee and cross-appellant, Noranda Aluminum, Inc. (Noranda), a Delaware corporation. The recovery was based on a jurisdictional strike

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* Associate Justice Tom C. Clark, United States Supreme Court, Retired, sitting by designation.

called and maintained by the Unions at the construction site of a primary aluminum smelter being built by Noranda in New Madrid, Missouri, in 1970. Jurisdiction was laid under § 303(b) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 187, and § 8(b)(4) thereof, 29 U.S.C. § 158(b)(4). The District Court found the strike to be illegal under § 158(b)(4)(D) for which compensatory damages were recoverable under § 303(b) but denied prejudgment interest, reasonable attorneys' fees incurred in the prosecution of the suit, and damages for the loss of cash flow. We affirm the judgment.

I.

The smelter was being constructed for Noranda under a contract with Kaiser Engineers, Inc. (Kaiser), during the period between March, 1969, and February, 1972, on a cost-plus-fixed-fee basis. Kaiser had collective bargaining agreements on a national basis with the international unions operating in the building trades. Its contract with Carpenters' International provided, among other things, that Kaiser would work the hours, pay the wages, and observe the working conditions established or agreed upon by Carpenters' International and the recognized bargaining agent in the locality where the work was performed. The Carpenters' International further agreed with Kaiser that "there will be no stoppage of work or any strike of its members either collectively or individually until said dispute or misunderstanding has been referred to the International Office of the Union and arbitrated between such International Office of the Union and the Home Office Representative of the employer." Preparatory to beginning construction, pre-job conferences and "mark up" meetings were held to determine the jurisdiction of the various unions involved in the project. Subsequently, Kaiser issued a "Summary of Jurisdictional Agreements, Joint Board Decisions, and Work Assignments," which included a section on work assignments that were still in dispute. With reference to

the latter, Kaiser assigned the work "in accordance with the National Joint Board procedure" by utilizing local and other practices in the trade. Under this section the pipefitters were assigned "air lift systems," "recovery systems," and "air operated gates and valves," while the millwrights were assigned "dry material chutes" and "rack and pinion gates." However, the cover letter transmitting this Summary provided that the assignments were subject to change by agreement between the disputing trades.

The record indicates that a number of jurisdictional disputes arose, of which some were settled by international representatives, others by business agents and stewards. A list of disputes between the millwrights and the pipefitters was prepared by Kaiser in October, 1969, and included such work assignments as "anode paste equipment," "dry material chutes," and "rack and pinion gates." The pipefitters' claim to jurisdiction over the latter two areas arose through an interpretation by the pipefitters of the "systems" used in the Kaiser assignment. The pipefitters claimed that "chutes and gates" were included within "systems" and insisted that such work be assigned to them. Kaiser subsequently made such a transfer on the understanding that the respective stewards of the disputing unions had agreed upon a division of the work in dispute along the line of the "St. Louis Agreement." This agreement provided that millwrights or pipefitters or both install equipment depending on the "system" in which the item functioned, its relation to other equipment, and similar factors. In late June, a jurisdictional dispute arose at the smelter site despite Kaiser's claim to have reached the understanding with the stewards. Both Local 618 and Carpenters' International deny that they agreed to be bound by the "St. Louis" rules, and all parties conclude that this is the crux of the controversy.

In an effort to settle the dispute, a meeting was held on July 8, 1970, among representatives of the Internationals

and the business agents and stewards of the two locals. No agreement was reached, however, and the controversy was referred to the "Presidents' Committee." The "Presidents' Committee" was established to resolve this type of controversy. However, no action was taken either by the Presidents' Committee or the Joint Board toward the settlement of the controversy. Kaiser, on the contrary, received a telegram from the Joint Board, directing it to proceed immediately with its initial work assignment since there was no agreement between the trades involved. Kaiser advised the Board that "any changes [it made] were at the job steward level at the job site." Kaiser insisted that the dispute be submitted to the Joint Board for decision on the merits, but appellants refused. Likewise, the contractor's suggestions that the parties arbitrate as provided in the contract between Kaiser and Carpenters' International fell on deaf ears. As the District Court specifically found, the record shows that the Business Agent of Carpenters' Local 618 had his "instructions" from Carpenters' International. See Findings 11 and 12.

On July 29, one day before the strike began, Kaiser agreed to temporarily halt work on the disputed items if the Business Agent of the Carpenters' Local 618 would meet with the Business Agent of the Pipefitters the next day. Kaiser issued the order and the pipefitters halted work on the 29th but the millwrights did not. The proposed meeting between the Business Agents was never held because the pipefitters' Business Agent was in an earlier scheduled business meeting, and the millwrights refused to wait until that meeting was over. They would not reschedule the proposed meeting. The pickets came on the next day, July 30, and continued through August 13, 1970. The object of the strike "was to force Kaiser to put millwrights on the rack and pinion gates and chutes and to remove the pipefitters therefrom." Both Kaiser and the Joint Board requested the President of the Carpenter's International to instruct Carpenters' Local 618 to remove the picket line but the request was ignored.

II.

Appellant-Unions' first claim is that the strike was not a jurisdictional dispute but on the contrary was caused by Kaiser's "failure to honor his own contractual assignment of work to which he has committed himself." Cf. *Highway Truckdrivers, Local 107*, 134 N.L.R.B. 1320 (1961). Appellant Unions say that Kaiser's August 1969 "Summary" obligated it to assign dry material chutes and pinion gates to the millwrights. However, the 14-day work stoppage here was the direct result of the conflicting jurisdictional claims of the pipefitters and the millwrights over that work. The situation fits like a glove the prohibition of § 8(b)(4)(D), regardless of whom the "Summary" favored. The nature of the conflict was the same and the opposing claims resulting in the strike were just as intolerable. Hence the resulting strike is illegal simply because "both groups persist in laying claim to the disputed work." *Laborers Local 116 (E & S Masonry, Inc.)*, 187 N.L.R.B. 482, 76 LRRM 1052, 1053 (1970). As Mr. Justice Black so well said as to a similar situation in *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union*, 364 U.S. 573 (1961):

> It is true, of course, that employers normally select and assign their own individual employees according to their best judgment. But here, as in most situations where jurisdictional strikes occur, the employer has contracted with two unions, both of which represent employees capable of doing the particular task involved. The result is that the employer is placed in a situation where the finds it impossible to secure the benefits of security from either of the contracts, not because he refuses to satisfy the unions but because the situation is such that he cannot satisfy them. . . . We therefore are not impressed by the Board's solicitude for the employer's right to do that which he has not been, and most likely will not be, able to do. At 582-583.

Here, in addition, the contract was ambiguous on the point which makes it the more imperative that the purpose of § 8(b)(4)(D) not be frustrated. *International Brotherhood of Carpenters* v. *C. J. Montag & Sons,* 335 F.2d 216, 220 (9th Cir. 1964), *cert denied,* 379 U.S. 999. However, we need not decide the matter on such a basis for here the trial court judge found against appellant unions deciding that a local agreement between the stewards of the competing unions had superseded the Kaiser agreement under the "Summary." We cannot say on the record here that this finding is clearly erroneous.

The Carpenters' International also argues that it cannot be held liable for the action of Local 618. But the underlying facts were decided against the Carpenters' International. The trial judge found that the strike was the result of the joint effort of the Carpenters' International and Local 618. The record also shows that the Carpenters' International, although kept fully informed of the situation, did nothing to prevent the strike. On the contrary, during its progress, the International continually ignored the pleas of Kaiser and the Joint Board to call it off.

We have made a careful examination of the record and find that substantial evidence supports the findings, and we cannot conclude that they are clearly erroneous. See, Findings 4, 5, 6 and 7; *N.L.R.B.* v. *International Longshoremen's and Warehousemen's Union, Local 10,* 283 F.2d 558, 565-66 (9th Cir. 1960); *International Brotherhood of Carpenters* v. *C. J. Montag and Sons,* 335 F.2d 216, 221 (9th Cir. 1964), *cert. denied,* 379 U.S. 999 (1965); *Truck Drivers Local Union 728* v. *N.L.R.B.,* 332 F.2d 693, 697 (5th Cir. 1964); *International Brotherhood of Electrical Workers* v. *N.L.R.B.,* 181 F.2d 34, 38 (2d Cir. 1950), *aff'd,* 341 U.S. 694, 704 (1951).

III.

Finally, appellant-Unions attack the award of damages as being totally unconnected to the strike and not calculated with reason and fairness. They downgrade the Kaiser estimates. Those estimates were prepared at the insistence of Noranda and base recovery on a comparative study between the time the project should have been completed without the strike and the actual time it took with the strike [C.P.M.]. They criticize the inclusion of certain elements in these computations, such as the time to attain "first metal" (January 23, 1971), the estimates of labor efficiency, and the failure of Kaiser to give any weight whatsoever to other significant events claimed to bear directly on the delay encountered.

We have carefully considered each of these claims. Noranda's final construction cost was $22 million over its original estimate of $85 million. It employed a task force of Kaiser professional personnel to determine the damages suffered because of the carpenters' strike. The experts came up with a number of damage items, summarized in Noranda's Exhibit 80, which include: cost directed at stopping the strike and picketing; railway demurrage, truck detention, warehousing costs, and rehandling expenses; construction and office equipment losses; salaries and utility overhead paid to cost-plus-fixed-fee contractors; start-up losses; and, the largest item, $693,090.10, covering premium payments of working manhours lost during, or as a result of, the strike. The court denied recovery of prejudgment interest, attorneys' fees, and loss of cash flow. A judgment was entered for $914,823.54 covering the other items above listed.

The appellant-Unions acquiesce in some of the allowances of the trial judge, including: (a) salary and expense amounts and attorneys' fees directed at stopping the strike; (b) railway car demurrage, truck detention, warehousing costs, etc., except for $9055 [1]; (c) rental and depreciation

[1] Appellant-Unions contest an item of $9055 of these costs resulting from "the unloading of bus materials on the ground at the Noranda site." The evidence as to it is not crystal clear.

costs of construction and office equipment, except two items (office equipment overhead loss, $5345.33, and builders risk insurance premium, $2719.53[2]; (d) salaries and utilities overhead paid to cost-plus-fixed-fee contractors; and (e) 35.5 per cent[3] of construction and raw material costs incurred to minimize start-up delay and utility overhead payments for a trained production staff that was forced to remain idle for 33 days.

The Unions dispute item (c) of the trial judge's findings on damages which includes increased overtime premium payments to work manhours lost by the craft construction employees of Kaiser Engineers, Comstock-Roper, and fixed-price subcontractors. Appellant-Unions break it down into two parts: $626,361 ascribed to work performed for Kaiser and Comstock-Roper, the electrical subcontractor, and overtime in the sum of $66,729.10 ascribed to work performed for fixed-price contractors. In essence the appellant-Unions say that this extra cost is attributable to the inefficiency of labor and a three-day strike of laborers which shut down work on July 23, 24, and 27, 1970. They, therefore, acquiesce in only 35.5 per cent of this item on the same ground as in item (f).

Section 303(b) provides for the recovery of "damages sustained and costs of suit" in cases involving illegal jurisdictional strikes. This includes all actual compensatory damages. *Teamsters Local 20* v. *Morton,* 377 U.S. 252,

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[2] Appellant-Unions reduce the "office equipment overhead loss" to the period of 15 days during which the strike lasted. Obviously the strike caused a longer period of delay than the 14 days it actually existed, and we cannot say that the 30 days allowed was clearly erroneous. The same is true as to the builders risk insurance premium.

[3] Appellant-Unions say that 64.5 per cent of this item is attributable to other causes, *i.e.,* 54.8 per cent to labor in efficiency and 9.7 per cent to a 3-day laborers' strike. The trial judge found to the contrary and on this record we cannot say the finding was clearly erroneous.

260 (1964). Experience in this field clearly shows that damages resulting from illegal jurisdictional strikes cannot be proven with exacting detail and the proof is therefore quite sufficient where the evidence supports a just and reasonable approximation. *Sheet Metal Workers, Local 223* v. *Atlas Sheet Metal Co.,* 384 F.2d 101, 109 (5th Cir. 1967). While it is true that the trial court did not spell out in meticulous detail each item of damage, he did clearly find that each item was caused by the illegal strike and that each was a just and reasonable approximation of the actual amount of the damages. The cases on claims of this type require no more. *Vulcan Materials Co.* v. *United Steel Workers of America,* 430 F.2d 446, 457-58 (5th Cir. 1970), *cert. denied,* 401 U.S. 963 (1971).

The Unions' major criticism centers on Noranda's reliance upon Kaiser's CPM method of computation which predicted January 23, 1971, as first metal date. In fact it was not reached until February 25, 1971. But the Unions overlook entirely the fact that this date was only first metal date on a modified basis of 88 pots, barely 50 per cent of the original projection. In calculating the damages the court accepted this date which only permitted a 33-day delay time when in fact it would have been much longer for the entire 176 pots called for in the specifications. Indeed, "total metal date" was not made until mid-June, 1971, almost five months later than originally projected. Perhaps some of this delay was occasioned by inefficient labor and certainly some was occasioned by the 3-day laborers' strike, but the point is that the trial judge chose February 25, 1971, as the cut-off date, when only 88 pots were completed. If he had chosen the mid-June date, when all pots were completed, perhaps the items that the Unions now complain about, as well as some others, would have some weight in the final calculations. We believe, however, that the course pursued was certainly a most reasonable and fair approximation. Indeed, if a later date had been chosen, making allowance for the expedition afforded the

88-pot project, and if the trial judge would have meticulously calculated the percentages as the Unions suggest, we dare say the damages would have totalled a much higher figure. We, therefore, conclude that the overall method of calculating the damages was eminently just and fair to the Unions and that the total amount allowed was a reasonable approximation of the amount suffered by Noranda.

IV.

On Noranda's cross-appeal, we find that the trial judge's conclusion was also correct. The claimed depiction of cash flow or profit is reminiscent of the Rube Goldberg cartoons that graphically transposed speculation into fact by a series of drawings depicting causes and effects. Likewise, to award prejudgment interest would have been to run *contra* to the prevailing rule. Here the damages were unliquidated and could not be ascertained prior to judgment. It is claimed that a majority of the money expended by Noranda was paid out by November 1, 1970. However, the greater part of the damage suffered was in the premium payments made for overtime which occurred between November 9 and February 25, 1971.

As to the attorney fees, we do not feel that Noranda brings itself within the class of exceptional cases warranting the allowance of fees as a punitive measure or for reasons of justice. While the action of the Unions was not in the best tradition of the trades, we feel that it would be untoward for us to upset the considered judgment of the trial judge who lived through the matter in all of its stages.

The judgment is therefore affirmed.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1975

No. 74-1467

NORANDA ALUMINUM, INC.,
Appellee,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, AND UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, LOCAL 618,
Appellants.

No. 74-1562

NORANDA ALUMINUM, INC.,
Appellant,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, AND UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, LOCAL 618,
Appellees.

Appeals from the United States District Court for the Eastern District of Missouri.

These causes came on to be heard on the record from the United States District Court for the Eastern District of Missouri and were argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby affirmed.

January 5, 1976

APPENDIX C

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1975

74-1467

NORANDA ALUMINUM, INC., *Appellee,*

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, ET AL., *Appellants.*

74-1562

NORANDA ALUMINUM, INC., *Appellant,*

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, ET AL., *Appellees.*

Appeals from the United States District Court
for the Eastern District of Missouri

Petition of appellee-appellant, Noranda Aluminum, for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

February 17, 1976

APPENDIX D

Findings of Fact and Conclusions of Law of the District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72 C 33 (1)

NORANDA ALUMINUM, INC.,
Plaintiff,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, AND UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, LOCAL No. 618,
Defendants.

FINDINGS OF FACT

(Filed in U.S. District Court December 28, 1973)

1. Noranda Aluminum, Inc. (hereinafter referred to as "Noranda"), is a domestic wholly-owned subsidiary of Noranda Mines, Ltd., a foreign corporation (which in the course of the proceedings herein agreed that all its claims, if any, against defendants are merged with plaintiff's claims and that it would be bound by these proceedings and the findings and judgment of this Court.)

2. Noranda was incorporated in Delaware in 1968 to establish and operate a 200-acre primary aluminum smelter in New Madrid County, Missouri.

Noranda entered into a contract with Kaiser Engineers, Inc. (hereinafter referred to as "Kaiser"), for the engineering design and construction of its smelter on a cost-plus-fixed-fee basis.

The contract called for the design and construction of a smelter consisting of 174 reduction cells or "pots" with a capacity of 70,000 tons per year production of primary aluminum.

3. Under the contract between Noranda and Kaiser, the employment of all subcontractors and building and construction trades employees, as well as the work tasks to be performed by those subcontractors and employees, were to be and were performed and determined by Kaiser.

In the performance of its contract with Noranda, Kaiser set up a field construction staff at the site in New Madrid County, Missouri, to manage, direct, and support direct construction activities. This construction staff assigned work to and supervised the work performed by the laborers, pipefitters, painters, teamsters, teamster operators, operating engineers, surveyors, boilermakers, cement masons, carpenters, millwrights, and iron workers directly employed by Kaiser, as well as the electricians employed by Kaiser's electrical subcontractor, Comstock-Roper, and other subcontractors employed from time to time by Kaiser.

4. Pursuant to its collective bargaining agreements with international building and construction trades unions, Kaiser conducted a pre-job conference at the construction site in February 1969, before actual construction activities began. At this meeting, attended by both international and local representatives of the various trades involved in the work, Kaiser agreed to observe the terms and conditions of employment established by the various trades in the Southeast Missouri building trades area.

5. Pursuant to its collective bargaining agreements with the respective international building and construction trades unions, Kaiser obtained craft employees using the local labor organizations of the respective internationals as a hiring hall source for employment and first construction activities began in March 1969.

6. In July 1969, Kaiser held several "mark-up" meetings to review local area and trade practices with respect to the assignment of work among the trades in the construction of the smelter. At these meetings, attended by both international and local representatives of the various building and construction trades, claims to particular work performance and items of equipment were asserted by the respective international and local representatives. Following these meetings, and on August 25, 1969, Kaiser issued a Summary of Work Assignments to the international and local union representatives in attendance at the July 1969 meetings.

7. Kaiser's August 25, 1969, Summary assigned certain "systems" in the various facilities comprising the aluminum smelter to pipefitter members of the United Association of the plumbing and pipefitting industry of the United States and its Local Union No. 562. The Summary assigned to millwright members of the United Brotherhood of Carpenters and Joiners of America and its Local 618 certain equipment items known as dry material handling rack and pinion gates and dry material handling chutes; in the case of the latter equipment items, the assignment was in terms of a local ironworker-millwright agreement.

8. In late June 1970, Carpenters Local 618 representative, J. D. Morris, complained to Kaiser that pipefitters were performing work on rack and pinion gates and material handling chutes that had been assigned to millwrights in the August 25, 1969 Summary. On July 8, 1970, international and local representatives of the millwrights and pipefitters met with Kaiser to discuss the dispute. Failing agreement the international representatives involved agreed and informed Kaiser that the dispute would be referred for determination by a special joint committee established by the United Brotherhood of Carpenters and the United Association to resolve jurisdictional disputes between the trades without resort to the procedures of the

National Joint Board for the settlement of jurisdictional disputes. On July 16th, however, the United Brotherhood also complained to the National Joint Board.

9. In November 1969 and January 1970, Ray Brown, the millwright steward, informed Kaiser that he and United Association Local 562 steward, DeWeese, had worked out an arrangement covering the installation of rack and pinion gates and material handling chutes which would cause "no problems" on the Noranda job. Other such arrangements in the past had been worked out between various crafts on the job from time to time.

10. The millwrights and pipefitters continued to work on rack and pinion gates and material handling chutes at the Green Carbon Plant in the period July 3-July 28, 1970.

11. At some time before July 28, 1970, Carpenters Local 618 business representative Morris, a representative of a carpenter type of local who did not know or understand millwright work, contacted Frederick Bull, the General Executive Board member of the United Brotherhood, who had been assigned by the United Brotherhood to advise and assist Morris as the international union's jurisdictional expert on millwright work. Morris described to Bull the work activities, as reported by Brown, being performed by pipefitters on rack and pinion gates and chutes at the Green Carbon Plant. On the basis of Morris' descriptions, Bull informed Morris that pipefitters were performing work on gates and chutes at the Green Carbon Plant that belonged to millwrights under the August 25, 1969, assignments and in accordance with the claims of trade autonomy contained in the Constitution of the United Brotherhood of Carpenters.

12. On July 28, 1970, Morris confronted Al Gordon, a representative of Kaiser's labor relations department in charge of the handling of jurisdictional disputes, and demanded that Kaiser take pipefitters off the work they

were then performing on gates and chutes at the Green Carbon Plant and place millwright members of the United Brotherhood of Carpenters and its Local 618 on the work; Morris stated that he had talked with the International and had his instructions. At the time of this conversation, neither Morris nor the United Brotherhood of Carpenters nor millwright steward Brown, upon whose observations the demand was based, were aware that millwrights, in fact, were performing final installation work on Green Carbon Plant gates and chutes or that they had been doing so since July 3, 1970, along with pipefitters. Morris however, demanded the removal of pipefitters from the work and requested Gordon to contact the General Office of the United Brotherhood of Carpenters concerning Morris' instructions. Gordon then telephoned the General Office of the United Brotherhood of Carpenters and talked with Jimmy Jones, the assistant to General President Hutcheson and the United Brotherhood's international representative in charge of its jurisdictional office. Jones, as had General Executive Board member Bull on several occasions in the past, demanded that Kaiser take pipefitters off the work they were then performing on Green Carbon Plant gates and chutes and replace them with millwrights, threatening trouble on the job if Kaiser did not comply with Jones' demand. Jones then instructed Morris, in the hearing of Gordon, that if Kaiser did not remove pipefitters and replace them with millwrights on the disputed work, Morris had authority to exercise his prerogative, which included a strike and picket line under the provisions of the United Brotherhood's Constitution for job or shop strikes.

13. As of the July 28, 1970, meeting between Gordon and Morris, Kaiser had not received any determination of the dispute between the United Association and the United Brotherhood of Carpenters from the special jurisdictional committee of those two internationals to which the dispute had been referred on July 8, 1970, and had received no job decision from the National Joint Board

for the settlement of jurisdictional disputes with regard to the dispute between United Association and the United Brotherhood. Gordon explained to Morris that in the absence of any determination from either the special jurisdictional committee or the National Joint Board, Kaiser could do nothing to change the way in which work on rack and pinion gates and chutes was then being performed by both pipefitters and millwrights other than to direct discontinuance of all work on rack and pinion gates and chutes at the Green Carbon Plant. Gordon then informed Morris that United Association Local 562 business representative Steska would be at the jobsite for another jurisdictional meeting on July 29, 1970, and at that time Gordon would attempt to set up a meeting between Steska and Morris in an effort to resolve the problem at the local level. Morris agreed to meet with Steska, which to that date he had refused to do, because the dispute was pending before the international's special jurisdictional committee. Gordon issued instructions that neither pipefitters nor millwrights were to perform any further work on rack and pinion gates or chutes at the Green Carbon Plant until after the proposed meeting between Steska and Morris on July 29th.

14. Due to a mix-up in schedules, Morris did not meet with Steska at the jobsite and refused to meet with Steska at Morris' home, since Morris had already informed the other construction trades on the project that a strike and picket line would occur on July 30, 1970.

15. At the beginning of the workday on July 30, 1970, members of the United Brotherhood of Carpenters and members of the United Brotherhood of Carpenters Local 618 went out on strike and picketed the Noranda construction project. During the continuance of the strike and picketing, both Kaiser and the National Joint Board repeatedly requested General President Hutcheson to direct cessation of the strike and picketing and either adjust the

dispute directly with the United Association or by submission for decision to the National Joint Board. Although General President Hutcheson could easily have done so, neither he nor the United Brotherhood of Carpenters at any time attempted to bring a stop to the strike and picketing. The picketing ended on August 13, 1970, following the filing of the lawsuit in this case, and was brought to an end by the instructions of Carpenters' General Executive Board member Bull. After the strike and picketing ended, and in October 1970, the dispute over rack and pinion gates and material handling chutes at the Green Carbon Plant was settled by agreement between Carpenters Local 618 representative Morris and United Association Local 562 representative Steska in a meeting attended by Carpenters' General Executive Board member Bull, who regularly attended such meetings in participation with Morris and in order to advise and assist Morris. The resulting agreement adopted the agreement between the St. Louis District Council of the United Brotherhood of Carpenters and the United Association Local 562, and provided that work on rack and pinion gates and material handling chutes would be performed by pipefitters and millwrights in exactly the same way it was performed in the period July 3-July 28, 1970.

16. As of July 30, 1970, construction craft manpower, consisting of the employees of Kaiser, the employees of Comstock-Roper, and the employees of ten fixed-price subcontractors actively at work on the project, was at its peak of about 1,386. As of this date, with the physical areas of many of the facilities more than fifty percent complete, construction activities on plant areas critical to first metal and Noranda's start-up of production were on schedule for the first smelting of primary aluminum on January 23, 1971. Taking into account the twenty-five strike interruptions which preceded the July 30th strike and the fifty-seven percent level of productivity of all crafts employed on the project, the status of construction activities and the sched-

uled manning were timely to the start-up and operation of 174 pots by Noranda on January 23, 1971, and, for these purposes, Noranda was in the process of training a production staff for first operations.

17. When the strike began on July 30th, and through the date of its discontinuance at the end of the workday on August 13, 1970, painters, cement masons, carpenters, millwrights, ironworkers, and boilermakers refused to cross the picket line and perform any work. Following termination of the strike and picketing on August 13, 1970, the construction work forces were not remobilized and reorganized to their pre-strike levels until August 27, 1970.

18. Kaiser made a detailed study of the effect of the strike's interruption and impact on the construction schedule and the first metal date of January 23, 1971, which would have occurred but for the strike interruption of July 30th. This study, completed about October 1970, showed that as a result of the man-hours lost during the period of the strike and picketing and the remobilization and reorganization following it and the impact of those work losses on schedule, first metal on the basis of the original plan of 174 pots could not be reached until October 1971, a delay of nine months in Noranda's start-up.

19. In order to minimize its delay in getting into production, Noranda accepted the recommendation of Kaiser to begin production with 88 pots and without the use of the planned Green Carbon, Anode Press and Metal Services Areas.

20. An overtime program implemented following the July 30-August 13, 1970, strike and picketing succeeding in limiting the delaying effect of the strike to thirty-three calendar days for first metal on this modified 88 pot basis without the Anode Press, Green Carbon and Metal Services Area.

21. However, by reason of defendants' wrongful and

illegal conduct in striking and picketing for the objective of forcing a work assignment, and as a result of such conduct, plaintiff suffered injuries in the following amounts:

(a) $13,534.23 incurred and paid in salary and expense amounts and attorneys' fees for activities directed to bringing a stop to the strike and picketing;

(b) $25,147.15 in railway car demurrage, truck detention, warehousing costs, and material rehandling costs, all as a result of the strike and picketing and the unavailability of craft labor forces to unload or receive railway cars and truck trailers;

(c) $693,090.10 in increased overtime premium payments to work the man-hours lost by the craft constructions employees of Kaiser Engineers, Inc., Comstock-Roper, and fixed price subcontractors during and as a result of the strike and in an effort to limit the impact and effects of the strike and picketing;

(d) $31,752.47 for the rental and depreciation costs of construction and office equipment required to be kept on the job an additional 33 calendar days as a result of the strike and picketing, which was the last work interruption on the job;

(e) $57,216.15 in salaried and utilities overhead paid to cost-plus-fixed-fee contractors required to be kept on the job an additional 33 calendar days because of the strike and picketing, which was the last strike and picketing or work interruption on the job;

(f) $94,083.44 consisting of $35,566.00 in additional construction and raw material costs incurred to minimize start-up delay and to limit the impact of the strike and picketing on production start-up to 33 calendar days and $58,517.44 in salaried and utility overhead payments for a trained production staff forced to remain idle and non-productive because of the 33 calendar day delay in start-up caused by the strike and picketing;

The total of these amounts is $914,823.54 and a judgment will be entered for the plaintiff and against both defendants.

22. Defendants particularly contend that the international union should not be held liable for any amount because they did not call the strike. They also contend that the damages were partially caused by a three-day strike of the laborers in July of 1970, that the premium time of $295,290.00 paid to the electricians was not caused by the strike. The Court rejects all of these contentions.

23. The plaintiff asks for additional damages of interest on the damages from the time incurred to the date of judgment; attorneys' fees on the bringing of this suit in a reasonable amount; loss of cash flow caused by the strike over a period of twenty-two years in the sum of $551,574.15. The Court rejects all of these contentions.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this cause under section 303 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. 187.

2. The plaintiff, Noranda, has standing to bring this lawsuit for injuries to it by reason of violation of section 8(b)(4)(D) of the Labor Management Relations Act, 29 U.S.C. 158(b)(4)(D).

3. The United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local No. 618 are labor organizations within the meaning of 29 U.S.C. 152.

4. From the beginning of construction activities by Kaiser on the Noranda smelter through the completion of those activities in February 1972, representatives of the United Brotherhood of Carpenters and Joiners and representatives of the United Brotherhood of Carpenters and Joiners Local 618 acted jointly and in concert with regard

to all matters of work jurisdiction under the collective bargaining agreement between the United Brotherhood and Kaiser and the trade autonomy claims of the United Brotherhood. Since the International and Local acted in concert, they are responsible for the conduct not only of their own agents but of each other's agents. *Vulcan Materials Co.* v. *Steelworkers,* 430 F.2d 446 (5th Cir. 1970).

5. On July 28, 1970, the assistant to the General President of the United Brotherhood of Carpenters, with full authority to instruct and require obedience from Carpenters Local 618, threatened Kaiser with trouble on the job if Kaiser did not remove pipefitter members of the United Association and United Association Local 562 from work then being performed on rack and pinion gates and material handling chutes on the construction site. At the same time, the assistant to the General President of the United Brotherhood of Carpenters, in no uncertain terms, advised Carpenters Local 618 that if Kaiser did not replace pipefitters with millwright members of the United Brotherhood of Carpenters and Carpenters Local 618 on the disputed work, Carpenters Local 618 was authorized to exercise its prerogative, which included the establishment of a strike and picket line under the provisions of the Constitution of the United Brotherhood for job or shop strikes. By thus provoking and instigating the strike and picketing which began July 30, 1970, United Brotherhood of Carpenters through its assistant to the General President, is equally liable with Carpenters Local 618 for the conduct of this strike. *Longshoremen's Union* v. *Juneau Spruce Corp.,* 189 F.2d 177 (9th Cir. 1951), aff'd 342 U.S. 237 (1952).

6. The strike and picketing which began July 30th and lasted through August 13, 1970, was conducted under the provisions of the Constitution of the United Brotherhood of Carpenters covering assertions of Carpenters' trade autonomy and jurisdictional claims and the United Brotherhood of Carpenters, at no time during the period July 30th

—August 13th, took any of the steps readily available to it to bring a stop to the strike and picketing. By this silence and inaction, the United Brotherhood of Carpenters acquiesced in and condoned the activity of Carpenters Local 618 at a time when there was full opportunity to prevent such activity or bring a halt to its effects. United Brotherhood of Carpenters is, therefore, liable as a principal actor along with Carpenters Local 618. *Local 984, IBT* v. *Humko Co.*, 287 F.2d 231 (6th Cir. 1961), cert. denied 366 U.S. 962 (1961).

7. Members of the United Brotherhood of Carpenters who were not members of Carpenters Local 618 participated in the strike and picketing activities and during the course of the strike and picketing United Brotherhood of Carpenters participated with and encouraged Carpenters Local 618 in carrying out its strike and picketing activity. The United Brotherhood, therefore, is liable to the same extent as is Carpenters Local 618. *Carpenters* v. *C. J. Montag & Sons, Inc.*, 335 F.2d 216 (9th Cir. 1964).

8. As of July 29, 1970, there existed a dispute between the United Association and its Local 562 and the United Brotherhood of Carpenters and its Local 618 over whether pipefitter members of the United Association or millwright members of the United Brotherhood were entitled to perform certain work for Kaiser on equipment items known as rack and pinion gates and dry material chutes. The United Association and United Association Local 562 claimed certain work on rack and pinion gates and chutes in piping systems while the United Brotherhood of Carpenters and Carpenters Local 618 claimed all rack and pinion gates and chutes whether within or without a piping system. In order to enforce their claim, the United Brotherhood of Carpenters and Joiners and Carpenters Local 618, through their respective officers, agents and stewards, engaged in a strike and picketing from July 30, 1970 through August 13, 1970, with the objective and purpose of forcing

and requiring Kaiser to assign the work of installing rack and pinion gates and dry material handling chutes to employees represented by the United Brotherhood and its Local 618 rather than to employees working as pipefitter members of the United Association and its Local 562. This strike and picketing is an illegal jurisdictional dispute under 29 U.S.C. 158(b)(4)(D) for which compensatory damages are recoverable under 29 U.S.C. 303. *Carpenters* v. *C. J. Montag & Sons, Inc., supra.*

9. This project was originally scheduled to cost $85,000,000.00, but the cost overrun exceeded the scheduled cost by approximately $22,000,000.00. Most of the overrun was due to work stoppages and labor inefficiency. The plaintiff Noranda has shown to a certainty that it sustained damages by reason of the illegal strike and picketing of the defendants in violation of the collective bargaining agreement between the United Brotherhood and Kaiser, upon which agreement the plaintiff specifically relied in authorizing Kaiser to perform construction activities on its smelter. The fact that some of the amounts of damages cannot be ascertained with certainty does not preclude recovery as to those amounts since the applicable measure of damages in a lawsuit of this kind is that of just and reasonable approximation. *Mason-Rust* v. *Laborers, Local 42*, 435 F.2d 939 (8th Cir. 1970).

Dated this 28th day of December, 1973.

/s/ JAMES H. MEREDITH
James H. Meredith
United States District Judge

APPENDIX E

Judgment of the District Court
Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72 C 33 (1)

NORANDA ALUMINUM, INC., *Plaintiff*,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, AND UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, LOCAL NO. 618, *Defendants.*

JUDGMENT

(Filed in U.S. District Court December 25, 1973)

A memorandum dated this day is hereby incorporated in and made a part of this judgment.

It Is Hereby Ordered, Adjudged, and Decreed that judgment in the amount of $914,823.54 is granted to the plaintiff, Noranda Aluminum, Inc., and against both defendants, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local No. 618. Plaintiffs' costs are assessed against both defendants.

Dated this 28th day of December, 1973.

/s/ JAMES H. MEREDITH
United States District Judge

APPENDIX F

Statute and Rule Involved

Sections 8(b)(4)(D) and 303 of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 158(b)(4)(D) and § 187, provides as follows:

> § 8(b) It shall be an unfair labor practice for a labor organization or its agents • • •
>
> (4)(i) to engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is— • • •
>
> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: • • •

§ 303:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of this Act.

> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 of this Act without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Rule 52(a) of the Federal Rules of Civil Procedure provides as follows:

> 52(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon * * * Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. * * * If an opinion or memorandum of decision is filed, it will be sufficient if the findings of the fact and conclusions of law appear therein. * * *

Supreme Cou. U. S.
FILED
AUG 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1904

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, LOCAL 618,
Petitioners,

v.

NORANDA ALUMINUM, INC.,
Respondent.

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari and Motion for Award of Damages for Delay

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1904

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, LOCAL 618,
Petitioners,

v.

NORANDA ALUMINUM, INC.,
Respondent.

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari and Motion for Award of Damages for Delay

QUESTION PRESENTED

Petitioners' Brief, through disregard of parts of the opinions below and misstatement of the nature of the legal issue or issues involved, does not properly set out the single question[1] for which review is sought. This question is whether the

[1] Petitioners maintain that this case involves Rule 52(a) which is set out at Appendix F of the Petition (Petition, page 2). Although neither Rule 52(a) nor any asserted inadequacy in the particularity

Findings of Fact of the trial court, sitting without a jury, that the illegal jurisdictional strike engaged in by Petitioners caused Respondent injuries in 6 particulars totaling $914,823.54 were clearly erroneous. The Court of Appeals decided the findings were not clearly erroneous and that the trial court correctly applied the law to the facts as found.

INTRODUCTION

This matter involves a question that does not warrant the Court's attention. As this Brief will show, the sum and substance of the Petition is a request, framed in terms of a so-called apportionment issue, that this Court review fact findings on damages arrived at by the trial court after 8 days of hearing and consideration of extensive evidence. The only basis for the request is Petitioners' dissatisfaction with the method of computing damages, the accuracy of the computations and the evidentiary support for the method and measure of damages assessment by the trial court. Since apportionment is required only where more than one "cause" exists and both the trial court and Court of Appeals found only one cause—the illegal conduct of Petitioners —existed, arguments concerning "apportionment" are no more than an effort to disguise fact quarrels under the cover of a legal issue that does not exist. Review of fact disputes, no matter how framed, is not the function of a writ of certiorari.

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of the trial court's Findings of Fact were raised before the Court of Appeals until the filing of a Petition for Rehearing more than 30 days after the Opinion of the Court of Appeals issued, review of the Petition here demonstrates that Petitioners restate in the argument concerning Rule 52(a) (Petition, pages 23-27) the same contentions set out in the argument concerning compensatory damages (Petition, pages 13-23). The impropriety of such restatement aside, it should suffice here to note that the Findings of Fact of the trial court were specific and particular enough to provide Petitioners with the material for devoting 52 pages of a 101-page Brief to the damages questions in the Court of Appeals.

STATEMENT OF FACTS AND THE CASE

The statement of Petitioners (Petition, pages 3-13) was prepared without regard to applicable principles of review which require that the evidence be viewed and construed favorably to the prevailing party below and that all reasonable inferences of which the evidence is fairly capable should be drawn in support of, and not against, the judgment given below. Petitioners refer only to selected parts of the Findings both in the statement of facts as well as in the description of the proceedings below. The version of facts at pages 5-10 of the Petition is directly at variance with and collides in all important respects with the actual Findings, in particular the Findings of the trial court concerning the effect of Petitioners' illegal strike, the impact of that strike and the number of construction days and man hours lost as a result of the strike's effect and impact. Therefore, in the interest of brevity and accuracy, Respondent adopts here as its Statement of Facts the complete Findings made by the trial court and sustained by the Court of Appeals which are found in the Appendix to the Petition, pages 5a to 10a and 13a to 22a. The Findings of particular significance to the question or questions sought to be raised here are Nos. 16 to 22, inclusive.

With regard to the Opinion of the Court of Appeals, and Petitioners' disregard of it, certain matters are of significance. First, the Court of Appeals, as was the case with the trial court, did not deal with or discuss an 11-work-day strike which the Petition asserts as fact is the length of the illegal strike involved (e.g., Petition, pages 5, 7 and 10); on the contrary, the Court of Appeals discussed damages properly attributable to "the 14-day work stoppage here" (Petition, page 5a). Secondly, the Court of Appeals reviewed the labor inefficiencies and 3-day Laborers' strike which are the substance of Petitioners' complaint here (Petition, pages 8-10), along with the effect of Petitioners' illegal strike, only in discussing the 5-month delay which Respondent suffered in getting to full pro-

duction on a 174 "pot" basis. Petitioners' excision of parts of the Opinion of the Court of Appeals and quotation of other parts in an effort to disguise what the Court of Appeals was dealing with (e.g., Petition, page 13) is made evident by a simple reading of the entirety of the language from which Petitioners select part. Thus, and based specifically on the findings of the trial court that Respondent was forced to and accepted start-up on a modified 88 "pot" basis only after the effect of Petitioners' illegal strike was determined and solely as a result of that strike alone (Findings, numbers 18 and 19, Petition, page 20a), the Court of Appeals concluded as follows with regard to the strike-caused change to a modified start-up (and not as set out in a misleading half-citation at page 13 of the Petition) as follows:

> "The Unions' major criticism centers on Noranda's reliance upon *Kaiser's CPM method of computation* which *predicted January 23, 1971, as first metal date. In fact it was not reached until February 25, 1971.* But the Unions overlook entirely the fact that *this date was only first metal date on a modified basis of 88 pots*, barely 50 per cent of the original projection. In calculating the damages the court accepted this date which only permitted a 33-day *delay time* when in fact it *would have been much longer for the entire 176 pots called for in the specifications. Indeed, 'total metal date' was not made until mid-June, 1971, almost five months later than originally projected. Perhaps*[2] *some of this delay was occasioned by inefficient labor and certainly some was ocasioned by the*

[2] Petitioners begin "quotation" of the Opinion of the Court of Appeals at this point, omitting what precedes in the same paragraph (Petition, page 13) and arguing that the Court of Appeals referred to the modified start-up delay in discussing the possible effects of labor inefficiencies and the 3-day Laborers' strike (Petition, pages 12 to 13, 16, 18, 26 to 27, n. 20, pages 26-27). The full paragraph set out above shows, as does the sentence preceding Petitioners' selected quote, that the Court of Appeals' reference to "some of this delay" was solely to the 5-month delay to mid-June.

3-day laborers' strike, but the point is that the trial judge chose February 25, 1971, as the cut-off date, when only 88 pots were completed. If he had chosen the mid-June date, when all pots were completed, perhaps the items that the Unions now complain about, as well as some others, would have some weight in the final calculations. We believe, however, that the course pursued was certainly a most reasonable and fair approximation. Indeed, *if a later date had been chosen, making allowance for the expedition afforded the 88-pot project, and if the trial judge would have meticulously calculated the percentages as the Unions suggest, we dare say the damages would have totalled a much higher figure.* We, therefore, conclude that the overall method of calculating the damages was eminently just and fair to the Unions and that the total amount allowed was a reasonable approximation of the amount suffered by Noranda." (Petition, pages 9a-10a, emphasis added).[3]

That the Court of Appeals, in the portion of its decision cited by Petitioners (Petition, page 13) was discussing the longer 5-month delay period until mid-June, 1971 when all "pots" were complete, and not the 33-day delay to modified start-up with 88 "pots" on February 25, 1971 which the trial court found was solely a result of the Petitioners' illicit activity, is clear.[4]

[3] As Petitioners note (Petition, page 7, n. 7) the reference to "176 pots" is an inadvertent error in the opinion.

[4] The evidence showed that during the period following termination of Petitioners' illegal strike through "first metal", costs as a result of labor inefficiencies and related construction trades' "practices" increased by $13,500,000 although Petitioners' illegal strike was the last to occur on the project (A. 353-355, E. 746 and 760). Taking the portion of these costs which Petitioners contended and now claim should be the "fraction" of project overrun for which they are responsible ("35.5%"—Petition, page 5), and using the "meticulous calculation of percentages" suggested by Petitioners, damages would total $4,792,500 attributable to Petitioners' misconduct. That misconduct, as found by both the trial court and the Court of Appeals, was "not in the best tradition of the trades" (Petition, page 10a).

The legal principle which governs decision here has been well established by this Court for many years, especially since the seminal cases of *Story Parchment Paper Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555 (1931) and *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946). This principle, that measurement of damages by "just and reasonable approximation" is sufficient, has been uniformly applied by the Courts of Appeals in § 303 damage actions like the case at bar (*United Mine Workers v. Patton*, 211 F.2d 742 (4th Cir.), cert. denied, 348 U.S. 824 (1954); *Vulcan Materials Co. v. United Steelworkers of America*, 430 F.2d 446 (5th Cir. 1970), cert. denied, 401 U.S. 963 (1971); *Riverside Coal Company v. United Mine Workers of America*, 410 F.2d 267 (6th Cir.), cert. denied, 396 U.S. 846 (1969)) and is the basis of the findings of the trial court on damages (e.g., Conclusions of Law, number 9, Petition, page 25a) and the Court of Appeals' affirmance of those damage findings (Petition, pages 9a-10a).

Petitioners seek review of this case because of a supposed need to make an apportionment of damages in compliance with this Court's settled determination that only compensatory damages are to be provided in Section 303 and other such suits for violation of federal law where legal injury is of an economic character. Although there is no question that this Court's established principles demand apportionment among "causes", the facts summarily set out below show that there is no need here to define the precise scope of the apportionment doctrine for the plain reason that the principles of apportionment are not applicable here. In particular, apportionment is appropriate only where damages are a result of more than one "cause"[5]—as the record conclusively shows in this case, the

[5] Petitioners cite at length quotations and examples concerning the doctrine of apportionment from Prosser, Torts (4th Ed. 1971) (Petition pages 15 to 17, 21); similar "maxims", identified by Petitioners as "the black letter law" (e.g., Petition, page 21, n. 16), are repeated at length from Restatement (Second) of Torts (e.g., Petition, pages 17-18 and n. 11, 21 and n. 16). Although such recitations are of substantial academic interest and may or may not be relevant to exposition of the "black letter law", the facts are that such lengthy dissertations are taken from Prosser's and the Restatement's "rules" concerning joint tortfeasors (e.g., Prosser, Torts, 4th Ed. 1971). Petitioners neglect to mention and seek to conveniently omit from consideration not only the preceding portions of Prosser and the Restatement which deal with "causation" and the fact that the principle of apportionment "rests upon" a determination that one or more "causes" may be charged with a single result (Prosser, Torts, (4th Ed. 1971), 241) but also the entire record here—thus, wholly aside from the fact that the opinions below found only petitioners' illegal conduct caused the damages here, the courts below specifically found that neither the 3-day Laborers' strike nor labor inefficiencies were "causes". These fact determinations, unless clearly erroneous, cannot be overturned and are of no concern to the Supreme Court. Thus, as Prosser, Torts (4th Ed. 1971), makes clear, l.c. 237:

> "Causation is a fact."
>
> ". . . [C]onduct is not a cause of the event, if the event would have occurred without it." (Id., 239).

sole "cause" for the damages awarded by the trial court and confirmed by the Court of Appeals was the illicit conduct of Petitioners.

In arriving at that part of the $13½ million cost increase in the period August, 1970—February, 1971 attributable to Petitioners' illegal strike, the only construction interruption during that period (A. 352-355), Respondent used a task force of professionals to determine damages. The fact, measure and amount of these damage items (E. 107; A. 481-482), and the 33-day delay underlying a number of them, were arrived at by a detailed study conducted by this task force of experts and specialists (A. 197-198, 202-203, 205-206, 208-210, 354-357, 360-361, 403, 431-434, 452-453). The members of the task force, with more than 138 combined years' extensive and detailed experience in construction, engineering, cost control and construction accounting (A. 157-160, 162-166, 175-176, 350-353, 403, 431-434, 436-437, 452-453), either testified or were present in the court room and their testimony was stipulated to as corroborative.

Each of the damage items arrived at by the task force, and those based on the task force's 33-day delay calculation, were corroborated and confirmed at trial by Respondent and its independent certified public accountant experienced in smelter auditing, construction accounting and the aluminum industry (A. 478-482, 494, 519-531). Although all books, records and documents upon which the damage items were based were provided Petitioners during discovery, *Petitioners introduced no evidence at trial with respect to the fact, cause or measure of any of the damage items now sought to be questioned here.*

The unrebutted evidence in the trial court showed that, as of July 30, 1970, "first metal" on the full 174 pot basis originally scheduled would have been reached January 23, 1971 taking into account all the work interruptions preceding Petitioners' July 30 strike and picketing and taking into consideration the substandard level of labor productivity on the part of all construction crafts (A. 360-361, 362-365, 386-392, 461, 513-514). The analysis and appraisal of the strike's impact on schedule, and critical areas in particular, demonstrated that if the 15,411 man days lost during the period of the strike and picketing and the remobilization and reorganization following it were not put back into construction activities at overtime in the period following the strike, "first metal" on the original 174 pot basis could not have been reached until October, 1971 and would not have been reached until March 31, 1971 on the modified 88 pot "first metal" basis dealt with by the trial court (A. 376-377, 392). The unquestioned evidence before the trial court illustrated that:

> But for the Petitioners' strike and picketing, "first metal" on the full original plan basis of 174 pots would have occurred on January 23, 1971 based on construction progress and productivity as of July 30, 1970 (A. 388-389, 391, 513-515);

> But for the Petitioners' strike and picketing, "first metal" would not have been modified to 88 pots using purchased anodes (A. 179-180, 388-392);
>
> But for the Petitioners' strike and picketing, "spot" and "scheduled" overtime to work 15,411 man days lost would not have been required (A. 356-357, 368, 375, 381, 386-387, 451-452, 463-465);
>
> Spot and scheduled overtime to put back in the hours lost as a result of the Petitioners' strike and picketing were necessary to limit the effect and impact of the strike on "first metal" (A. 376-377);
>
> But for the use of this overtime program, Petitioners' strike would have delayed "first metal" on the original basis in effect July 30 from January 23, 1971 to October, 1971 (A. 376-377, 392);
>
> But for the overtime program, the Petitioners' strike and picketing would have delayed "first metal" on the modified 88 pot basis from February 25, 1971 to March 31, 1971 (A. 392);
>
> And, even with modification of "first metal" to the changed 88 pot basis described above, and use of an overtime program to work manhours lost, only the Petitioners' strike and picketing delayed "first metal" from January 23, 1971 to February 25, 1971 or 33 calendar days (A. 210, 375-376, 390-392, 400, 402, 439, 444-445, 447-448, 450-451, 452-453, 463).

Summarizing the evidence presented, the trial court concluded that Respondent had "shown to a certainty" that it sustained damages "by reason of the illegal strike and picketing" of the Petitioners (Conclusions of Law, number 9, Petition, page 25a) and that the "applicable measure of damages" so suffered is that of "just and reasonable approximation" (Conclusions of

Law, number 9, Petition, page 25a). Insofar as the trial court's determination with respect to the first factor—causation—is concerned that problem is a fact question only[6] and the trial court resolved the question in accordance with overwhelming judicial authority holding:

> ". . . [I]t is enough that he [the plaintiff] introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise."[7]

Similarly, in deciding the damages aspect of this case once the factual issue of causation was resolved, the trial court applied and found in accordance with settled authority[8] that:

> ". . . [W]hile the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate."[9]

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[6] Prosser, Torts (4th Ed. 1971), 236-249; Restatement (Second) of Torts, §§ 431, 433.

[7] Prosser, note 6 *supra*, at 242.

[8] *Iodice v. Calabrese*, 512 F.2d 383 (2d Cir. 1975); *United Mine Workers v. Patton*, 211 F.2d 742 (4th Cir.), cert. denied, 348 U.S. 824 (1954); *Vulcan Materials Co. v. United Steelworkers of America*; 430 F.2d 446 (5th Cir. 1970), cert. denied, 401 U.S. 963 (1971); *Sheet Metal Workers, Local 223 v. Atlas Sheet Metal Co.*, 384 F.2d 101 (5th Cir. 1967); *United Mine Workers of America v. Osborne Mining Co.*, 279 F.2d 716 (6th Cir.), cert. denied, 364 U.S. 881 (1960); *Metropolitan Paving Co. v. International Union of Operating Engineers*, 439 F.2d 300 (10th Cir.), cert. denied, 404 U.S. 829 (1971).

[9] *Story Parchment Paper Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

> "Damages are difficult to ascertain with exactness in this type of case [Section 303] . . . [I]t would seem to place an impossible burden on the plaintiff to require him to prove damages with mathematical precision. As the court said in *Sheet Metal Workers v. Atlas Sheet Metal Co.* . . . 'it is sufficient if the evidence supports a just and reasonable approximation.' "[10]

In affirming the trial court's fact determinations on the issues of causation and damages, the Court of Appeals provided no more than this Court has uniformly required in cases where injuries of an economic nature are caused by violation of federal law,[11] e.g., "damages directly and proximately caused by wrongful conduct chargeable to the defendants as defined by the traditional law of torts."[12] In thus affirming and concluding under the applicable standard of review that the trial court's fact determinations and application of the law to those facts were not clearly erroneous (Petition, pages 8a-10a), the Court of Appeals gave meaning to what was well stated in another context as follows:

> "After all the technical statistical jargon . . . as well as the less esoteric numbers and percentages were placed before the trial judge, it was his job to resolve the issues."[13]

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[10] *Mason-Rust v. Laborers Local* 42, 306 F.Supp. 934, 939 (E.D. Mo. 1969), affirmed, 435 F.2d 939 (8th Cir. 1970).

[11] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-419 (1975); *Teamsters Local 20 v. Morton*, 377 U.S. 252, 260-261 (1964).

[12] *United Mine Workers v. Gibbs*, 383 U.S. 715, 730 (1966).

[13] *Chance v. Board of Examiners*, 458 F.2d 1167, 1173 (2d Cir. 1972).

PETITIONERS' AUTHORITIES DISTINGUISHED

The Petition here is directed to that which the trial court (Petition, page 25a) and the Court of Appeals (Petition, pages 9a to 10a) determined the law does not require—"meticulous calculation of percentages." Petitioners demand "mathematical precision" not only in connection with the assessment of damages but also, as analysis reveals, with regard to the strictly factual questions of causation. The latter questions, moreover, are the essence of the Petition since it is well established that the legal issues of whether and to what extent damages can be apportioned among "causes" do not and cannot arise until it is shown that more than one "cause" exists.[14] The courts below, on an extensive and detailed record to which Petitioners presented nothing contra, found that only Petitioners' illegal strike and picketing caused the injury and damages assessed insofar as the 33-day delay in arriving at "first metal" and its attendant consequences are concerned—the 3-day Laborers' strike and the lack of productivity of all construction crafts, among which conditions Petitioners maintain damages ought to have been but were not apportioned (Petition, pages 8 to 10, 13 to 23, 26 to 27 and n. 20, pages 26 to 27), were simply not found to be "causes" vis-a-vis the injury and damages with which this matter is concerned.

Assuming that Petitioners suffer that "confusion" which the often-cited Prosser (Petition, pages 16 to 21) attributes to those who, as here, attempt to deal with the problem of apportionment in terms of causation,[15] the fact remains that the entirety of Petitioners' argument concerning the legal issues and intricacies of apportionment together with the decisions and treatises cited in support of that argument (Petition, pages 13 to 23) are neither

[14] Prosser, Torts (4th Ed. 1971) at 248-252, 289-290, 313.

[15] Prosser, supra note 14, at 248-252, 289-290, 313.

applicable nor relevant. That argument and those decisions and treatise references to Petitioners' recitations of "black letter law" (Petition, page 21, n. 16) simply have nothing to do with and are not involved in a matter like the present case where only one "cause"—the illicit activity of Petitioners—is involved. The 3-day Laborers' strike, which the record showed was the kind of brief interruption of construction activity that could be and was contained by reallocation of manpower to critical work items without any effect upon the first metal date scheduled prior to Petitioners' illicit strike (A. 242-243, 365-366, 387-389, 404-406, 460-462), although an antecedent "condition", was found not to be a "cause" of the injury with which this case is concerned. The inefficiency and lack of productivity of all construction tradesmen, which the unrebutted evidence showed was, like the 3-day Laborers' strike, taken into account and considered in determining the effect of Petitioners' wrongful strike and picketing (A. 360-361, 363-365, 404-406) was not only a condition antecedent but, to the extent that productivity declined further and inefficiency increased following Petitioners' illegal strike, part of the damages flowing from that misconduct (A. 239-242, 409-411, 429-431, 451-452, 461, 465).

Petitioners' argument concerning "apprortionment" (Petition, pages 13 to 23) rests upon Petitioners' misstatement of the 3-day Laborers' strike (Petition, page 10) and labor inefficiency (Petition, pages 8 to 10) as "causes" of the first metal delay involved in this case—since neither of these factors are "causes" or were found to be "causes" by the courts below, Petitioners' effort to convert an attack on the trial court's fact findings into an asserted question of law must fail.[16] Petitioners not only dis-

[16] Insofar as Petitioners object to the quality of the evidence provided by Respondent in the trial court (Petition, pages 5 to 7), and notwithstanding the misrepresentations set out in those objections, it is sufficient to note that these complaints go to fact determinations of the kind with which this Court is not concerned. In addition, Petitioners neglect to mention that in addition to the

regard the settled principle that one who engages in misconduct takes existing circumstances as they are, but also the plain fact that the only question here is the trial court's proximate cause determination—a determination that the Court of Appeals properly found should be affirmed under applicable standards of review.

> "It were infinite for the law to judge the cause of causes, and their impulsion of one another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree."[17]

The demand for "mathematical precision" in the determination of causation and assessment of damages that is the basis of Petitioners' inapplicable "apportionment" argument is repeated, with equal lack of relevance, in that part of the Petition dealing with the "specificity requirements" of Rule 52(a) of the Federal Rules of Civil Procedure (Petition, pages 23 to 27). Insofar as such a complaint can be raised for the first time following issuance of an appellate court opinion,[18] summary analysis of Petitioners' argument and inapposite citations illustrates no cause for "complaint" exists. First, the trial court's detailed Findings of Fact (Petition, pages 13a-22a) set out that factual basis for each of its Conclusions of Law (Petition, pages 22a-25a) which is the settled "requirement" of Rule 52(a). *Hatahley v. United States*, 351 173 (1956); *Kelley v. Everglades*

CPM program upon which construction delay factors were based in the trial court, Respondent demonstrated by exhibits (E. 102-104, 141-387, 462-705, 734-766) and testimony (A. 160-163, 173-174, 183-184, 190-193, 196-198 214-218, 240-242, 358-359, 365-366, 404-407, 432-433, 457-458, 461-462) that the illegal jurisdictional strike of Petitioners caused the damages established here with certainty. No evidence of any nature was introduced by Petitioners in this regard, although ample opportunity was provided.

[17] Bacon, *Maxims of the Law*, Reg. I as quoted in Prosser, Torts (4th Ed. 1971), note 63 at 244.

[18] See note 1 *supra*.

Drainage District, 319 U.S. 415 (1943). "Exacting detail", called for by Petitioners with respect to items to which Petitioners presented "detailed challenge"—but no evidence whatsoever —in the trial court (Petition, pages 23 to 24, n. 20, pages 26 to 27), is not the purpose of Rule 52(a) and has never been a "requirement" of that Rule.[19] Secondly, Rule 52(a) does not "require" and has never been held to demand—in § 303 or any other type of damage action—anything other than the kind of separate statement of the amount of damages for each item found compensable contained in the trial court's Findings (No. 21, Petition, pages 20a to 22a).[20] Petitioners' contrary argument that the decision of the Court of Appeals here creates a "special rule" and conflicts with two inapposite decisions of the Ninth Circuit Court of Appeals in which "lump sum" damage awards were found inadequate (*Plumbers & Fitters, Local 761 v. Matt J. Zaich Const. Co.; Carpenters Local 1273 v. Hill*—Petition, pages 25-26)[21] is easily disposed of by the language of the Court of Appeals affirming the trial court's damage findings. Thus, the Court below concluded (Petition, page 9a):

> "While it is true that the trial court did not spell out in meticulous detail each item of damage, he did clearly find

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[19] *United States v. Merz*, 376 U.S. 192 (1964); *Lemelson v. Kellogg Co.*, 440 F.2d 986 (2d Cir. 1971); *O'Neill v. United States*, 411 F.2d 139 (3d Cir. 1969); *Pritchett v. United States*, 425 F.2d 663 (5th Cir. 1970); *Life Savers Corp. v. Curtiss Candy Co.*, 182 F.2d 4 (7th Cir. 1950); *United States v. Birnbach*, 400 F.2d 378 (8th Cir. 1968); *Swanson v. Levy*, 509 F.2d 859 (9th Cir. 1975).

[20] *Hatahley v. United States*, 351 U.S. 173 (1956); *Neill v. Diamond M. Drilling Co.*, 426 F.2d 487 (5th Cir. 1970); *Zatina v. Greyhound Lines, Inc.*, 442 F.2d 238 (8th Cir. 1971).

[21] *Plumbers & Fitters, Local 761 v. Matt J. Zaich Const. Co.*, 418 F.2d 1054, 1059 (9th Cir. 1969) and *Carpenters Local 1273 v. Hill*, 398 F.2d 360, 362 (9th Cir. 1968) are in accord with the settled, but inapplicable, rule that "remand for further findings under Rule 52(a) is necessary only when an appellate court cannot adequately review the 'lump sum' award in light of the objections raised" (*Neill v. Diamond M. Drilling Co., supra* note 20 at 491-492).

> that each item was caused by the illegal strike and that each was a just and reasonable approximation of the actual amount of the damages. The cases on claims of this type require no more. *Vulcan Materials Co. v. United Steel Workers of America*, 430 F.2d 446, 457-58 (5th Cir. 1970), cert. denied, 401 U.S. 963 (1971)."[22]

Finally, Petitioners totally disregard the meaning and intent of the very "rule" whose "requirements" the Petition argues should be observed. Contrary to the settled principle that findings of the trial court are not to be disturbed unless "clearly erroneous",[23] Petitioners reassert in this part of the argument the identical fact issue quarrels complained of under the "apportionment" part of the Petition (e.g., Petition, pages 23-24, n. 20, pages 26-27). Such argument is totally misplaced as reference to the Opinion of the Court of Appeals (Petition, pages 9a to 10a) and the following provision of Rule 52(a) illustrates:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." (Appendix F; Petition, page 28a).

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[22] Petitioners' contention that the Court of Appeals erred in citing *Vulcan Materials Co. v. United Steel Workers of America* because the Fifth Circuit "nowhere discussed" sufficiency of findings is untrue as reference to the pages of the *Vulcan Materials Co.* decision cited by the Court of Appeals here demonstrates.

[23] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975); *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Vulcan Materials Co. v. United Steelworkers of America*, 430 F.2d 446, 458 (5th Cir. 1970), cert. denied, 401 U.S. 963 (1971).

CONCLUSION

It is respectfully submitted that Petitioners have totally failed to approach, much less sustain, the burden of establishing under Rule 19 of the Rules of this Court that there are special and important reasons why the Writ should be granted. The decision below did not involve important questions of federal law which have not been, but should be, settled by this Court; nor has the Court of Appeals decided any federal question in a manner that conflicts with applicable decisions of this Court or of another Court of Appeals on the same matters. The Court of Appeals correctly held that the Findings of Fact and Conclusions of Law of the trial court were not clearly erroneous.

MOTION FOR AWARD OF DAMAGES FOR DELAY

Respondent, upon its brief in opposition to the granting of the petition for writ of certiorari filed herein, moves the Court for an award of reasonable damages pursuant to Rule 56(4) of the Rules of this Court, if the petition for writ of certiorari be denied, upon the basis that it is manifest that there was no ground for granting such a writ.

Respectfully submitted,

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Supreme Court, U. S.
FILED
AUG 27 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1904

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, AND UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, LOCAL 618, *Petitioners,*

v.

NORANDA ALUMINUM, INC., *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

I.

Respondent agrees that "there is no question that this Court's established principles demand apportionment among 'causes' " (Resp. Br. 6). He seeks to avoid review and reversal of this error of law by claiming that "the facts summarily set out below show that there is no need here to define the precise scope

of the apportionment doctrine for the plain reason that the principles of apportionment are not applicable here" (*id.*) The short and conclusive answer to respondent's characterization of the facts is the Court of Appeals' determination that "[p]erhaps some of this delay was occasioned by inefficient labor and *certainly* some was occasioned by the 3-day laborers' strike * * *" (Pet. 9a, emphasis added, quoted at Pet. 13-14).

Thus, the assertion that "both the trial court and Court of Appeals found only one cause" (Resp. Br. 2) totally ignores what the Court of Appeals actually decided. It is entirely understandable that the Court of Appeals should have deemed to be clearly erroneous a finding that a Carpenters' strike for 11 working days caused a 33-day delay in completion, but that a 3-day Laborers' strike which immediately preceded it caused no delay whatsoever. The Court was also justifiably skeptical ("perhaps") of a likewise unexplained finding that excess overtime for electricians was caused entirely by a Carpenters' strike, and not at all by the substantial deviation from targeted efficiency standards by electricians. Respondent's elaborate effort to rehabilitate the trial court's finding that there was but one cause for the delay cannot alter the present legal posture of the case which is that the Court of Appeals has decided that this is a multiple causation case but that the defendant is nevertheless not entitled to an apportionment of damages. Petitioners have thus been mulcted for damages for injuries not caused by their violation of § 303, a result which defeats the Congressional policy in enacting § 303 (Pet. 14, 15, 20, 22-23), and is admittedly contrary to this Court's precedents.

II.

What respondent's lengthy discussion of the testimony and exhibits *does* demonstrate is the patent insufficiency of the trial court's conclusory findings. Respondent thereby invites this Court, as it did the Court of Appeals, to examine the voluminous evidence and to take it on faith that the trial court credited all the cited testimony, drew the inferences urged by respondent, and ignored all contrary evidence in the record . If the specificity requirements of Rule 52(a) had been met, this would be unnecessary; indeed, if the trial court had subjected itself to the discipline of making particularized findings on the basis of the evidence, it might well have entered a far lower damage award.

Respondent asserts that the adequacy of the findings was not challenged in the Court of Appeals prior to the petition for rehearing (Resp. Br. 1-2, n. 1, 14). Respondent is in error; the point was made at the very outset of defendants' argument on damages (p. 48):

> "The District Court found that the strike caused recoverable damages in the sum of $914,823.54 (A. 37-38). Its determination is entirely conclusory, unaccompanied by any reasoned explanation particularizing the means used to reach this result. Its decision is therefore flawed at the threshold. For, '[u]nlike a jury, which may award damages without substantiation of its reasons for arriving at a certain amount, the district court in such a situation is obliged to set out the rationale behind its damage awards.' "

The remainder of that argument, while establishing (or so defendants believed) that the damage award

was clearly unsupportable on any basis, also provided an object demonstration that the evidence was so complex and voluminous, that the trial court's conclusory findings were wholly insufficient to achieve the purposes of Rule 52(a).

Respondent's defense "that the Findings of Fact of the trial court were specific and particular enough to provide Petitioners with the material for devoting 52 pages of a 101-page Brief to the damages questions in the Court of Appeals" (Resp. Br. 2, n. 1 cont.) is utterly specious; it was, of course, the record made at trial that provided the 'material" which necessitated the lengthy discussion; indeed, if the findings had been more specific, and had explained the basis, if any, of the trial court's resolution of the disputed items, the task of counsel as well as of the reviewing court would have been greatly simplified. As Judge Waterman wrote in *Fuchstadt* v. *United States*, 434 F.2d 367, 370 (C.A.2):

> "While '[t]he nature and degree of exactness of the findings required depends on the circumstances of the particular case,' *Kelley* v. *Everglades Drainage District*, 319 U.S. 415, 419, we think that in tort actions for damages the pertinent consideration entering into the award as well as the amount allowed for each item should be stated briefly and clearly 'so that the appellate court can properly appraise the elements which entered into the award. * * * Without this information the defendant is unable properly to exercise the appellate rights conferred by statute and the court is equally unable to make appropriate appellate review.' *Alexander* v. *Nash-Kelvinator Corp.*, *supra*, 261 F.2d [187] at 191."

The Court of Appeals could have determined that defendants had sufficiently shown that on any view of

the record, the disputed elements of the damage award (in addition to the disapproved causation finding, see pp. 1-2 *supra*) were "clearly erroneous", or based on an error of law. It also could have remanded for further findings. But it could not properly sustain findings of which, because Rule 52(a) was not complied with, it was "unable to make appropriate appellate review" (*id.*).

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for certiorari should be granted.

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